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No. 858.

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and the State of West Virginia.

Appeal from the District Court of the United States for the District of Maryland.

BRIEF FOR APPELLANT.

Statement of the Case.

This was a bill in equity (R. 1) by the James Clark Distilling Company, a corporation under the laws of Maryland, engaged in the business of manufacturing and selling spirituous liquors at Cumberland in that state. Defendant operates an express business over the railroad of the Western Maryland Railway Company in the states of Maryland, Pennsylvania and West Virginia, having a line which extends from

Cumberland, Maryland, into and through the counties of Mineral, Grant and Tucker, in the State of West Virginia, comprising the 16th judicial circuit of that state. Defendant is a common carrier engaged in interstate commerce within the meaning of the act of Congress, entitled "An Act to regulate commerce" and the amendments thereto. The bill charges that defendant is equipped with all facilities for the handling of interstate commerce from Cumberland, Maryland, and its delivery at stations at various towns in Mineral, Grant and Tucker Counties, West Virginia, including the town of Parsons in Tucker County.

In the 5th paragraph of the bill it is stated that on August 20, 1914, plaintiff received at Cumberland, Maryland, by mail, a written order from one Floyd Rosier, a resident of the town of Parsons, West Virginia, to ship to him at Parsons, from Cumberland, Maryland, four quarts of alcohol of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for $4.00, the purchase price of the alcohol. The bill alleges that the order stated on its face that the alcohol was for the personal use of said Rosier and that the order was given without any solicitation on the part of any person inducing Rosier to send the same. The bill charges that complainant believes that said alcohol was intended for the personal use of Rosier, and has no reason to suspect that the order for said liquor was given or intended in any way to violate the laws of the State of West Virginia. On August 20th, the day the order was

received, complainant prepared one gallon of alcohol in pursuance of said order and presented the same to the agents of defendant company at Cumberland for transportation to the consignee at Parsons, tendering the transportation charges, but the agents of defendant at Cumberland refused to accept the shipment, giving as the reason, and the only reason for said refusal, that the company had been enjoined by an order of the Circuit Court of Tucker County, West Virginia, from receiving, transporting or delivering any intoxicating liquors at or in said three counties in West Virginia, "except on conditions set out in said injunction which were so burdensome to said business and traffic and interstate transportation of said liquors, as made it impossible for said express company to comply with the same."

Paragraph 7 of the bill refers to an act of the legislature of West Virginia, passed February 11, 1913, effective July 1, 1914, prohibiting the manufacture and sale or keeping for sale of spirituous liquors, etc., in the state of West Virginia, and charges that the transportation of the liquors purchased by Rosier was not prohibited by the law of West Virginia, and that the injunction granted by the Circuit Court of Tucker County and served upon defendant company was no legal excuse for the refusal of defendant to accept and transport said liquors in interstate commerce.

Paragraph 8 of the bill alleges that complainant has on hand in the state of Maryland a large and valuable quantity of liquors of the kinds described in the

law of West Virginia, effective July 1, 1914, and that prior to the service of the injunction of the Tucker Circuit Court upon defendant, complainant was doing a profitable business in shipping such liquors to persons residing in West Virginia for their personal use; that complainant has been informed by defendant and The Western Maryland Railway Company, being the only common carriers available, that said companies will not hereafter accept for transportation from complainant at Cumberland, Maryland, any intoxicating liquors consigned to complainant's customers in said three counties of West Virginia. It is alleged that unless defendant is restrained by order of the district court from persisting in its refusal to carry and deliver complainant's product in such interstate commerce, complainant's business will be destroyed and its profits therein exceeding the sum or value of $3,000.00 will be lost.

It is charged that defendant has violated, and unless enjoined by order of the court will continue to violate, to complainant's irreparable injury for which it has no adequate remedy at law, sections 1 and 3 of the Act to Regulate Commerce and Amendments thereof, by subjecting complainant's business and traffic therein to undue and unreasonable prejudice and disadvantage.

The prayer of the bill (R. 7) is that a decree issue;

> "commanding and enjoining the defendant, its servants, agents, employees and officers and each of them, to cease refusing to accept for

transportation, over its express line in due course of business, from Cumberland to points of delivery in the counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid liquors, ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers, to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its lines to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers, to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its express line in the said three counties of West Virginia, where the defendant maintains a permanent office or station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the laws of West Virginia, and perpetually requiring and commanding the defendant, its agents and servants to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three counties of West Virginia, to the consignees thereof upon such aforesaid orders of your orators customers, and that your orator may have such other and further relief as its case may require."

The answer (R. 8) admits all allegations of fact stated in plaintiff's bill, but not plaintiff's deductions therefrom, and shows that,

> "in a suit in the Circuit Court of Tucker County, West Virginia, in equity, entitled 'The State of West Virginia who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff, vs. The American Express Company, an association doing business in the State of West Virginia,' an order or decree was, on the 10th day of August, 1914, passed by said court, a copy of which is herewith filed as a part hereof, marked 'Defendant's Exhibit No. 1' by which this respondent was enjoined and prohibited from transporting intoxicating liquors to Tucker County, West Virginia, as set forth in said order; and this respondent is advised that it cannot transport intoxicating liquors to Parsons, West Virginia, without the risk of violating the laws of the state of West Virginia and the terms of said injunction."

Defendant's Exhibit No. 1 to its answer (R. 9) is an order of the Circuit Court of Tucker County, West Virginia, made in vacation, enjoining the American Express Company from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of Tucker County, or elsewhere within the jurisdiction of the court,

> "unless said defendant express company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of

the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere, within the jurisdiction of the court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the

name of some fictitious person, or otherwise, and then only when the consignee has orderad the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the Court, other than is consistent with the allegations and prayer of said bill."

On the 19th day of October, 1914 (R. 12), the state of West Virginia presented a petition to be made a party and intervene in the case. The petition was allowed and the state was made an intervening party without objection by the other parties, by an order of the court, dated December 9, 1914 (R. 24). The petition of the state (R. 12) shows that on the 10th day of August, 1914, the state filed the bill and obtained the injunction heretofore referred to in the Circuit Court of Tucker County. Copies of the bill and injunction are attached to the petition as exhibits, and the allegations therein contained are adopted by the state as a part of its petition. The petition then alleges that plaintiff, The James Clark Distilling Company has been circulating printed and written letters, order blanks and price lists in the state of West Virginia, and particularly in the 16th judicial circuit thereof, soliciting orders for intoxicating liquors to be shipped

to consignees in said district; that complainant has been shipping such liquors since the first day of July, 1914, to citizens of West Virginia "without any effort to ascertain the character, ages and habits of the person who ordered the same, nor the purposes to which they intended to put such intoxicating liquors." It is then alleged that "by provisions of the statute of your petitioner relative to intoxicating liquors, in case of any sale, and the shipment of intoxicating liquors into the state of West Virginia by common or other carrier, the sale thereof is deemed to be made at the county where the intoxicating liquors are delivered. That the statute of your petitioner, respecting intoxicating liquors, forbids the sale of, or soliciting of orders for, any intoxicating liquors in this state except the sale of pure grain alcohol by druggists, etc." It is further alleged that in delivering intoxicating liquors within West Virginia, a common carrier is required to use good faith to ascertain that such liquors are not intended to be used in violation of law; that plaintiff made no effort to ascertain the "age, habits or character of Floyd Rosier" or to ascertain "the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill" and that plaintiff has shipped other intoxicating liquors since July 1, 1914, into West Virginia "regardless of the purpose or use that the persons so receiving the same might make thereof."

The state's intervening petition does not allege any facts in regard to the age, habits or character of Rosier

or any of the consignees, or that any of them have used or will use any liquors shipped by plaintiff for illegal purposes and in violation of the law of West Virginia. The petition does not undertake to deny the allegation in the verified bill that complainant's shipments are intended for the lawful, personal use of the consignees.

The prayer of the state's intervening petition is that the relief prayed by complainant to establish its right to ship in interstate commerce for personal use be denied.

The cause was set for hearing and evidence produced by both parties (Transcript of Evidence R. 25), this case being heard along with the case of James Clark Distilling Company vs. Western Maryland Railway Company in which the state was intervenor and which is pending here as No. 857, October term 1914. The evidence was largely directed to questions of fact conceded by the pleadings not to be in issue. Some of the evidence was directed to the question whether James Clark Distilling Company had since the 1st day of July, 1914 by letters or circulars advertised its product in West Virginia. In our opinion the disputed questions of fact disclosed in evidence are immaterial and the questions necessary to be decided here are purely questions of law.

It appeared in evidence (R. 35) that the injunction obtained by the state against the express company in the Circuit Court of Tucker County was a preliminary injunction issued ex parte and that the express com-

pany made no motion to dissolve, filed no answer, and did not attempt to carry interstate shipments of liquor under the conditions which the injunction prescribed, but refused absolutely to continue such interstate business.

On December 18, 1914, the court handed down an opinion which appears at R. 35, and is reported in 219 Fed. at p. 333, 339, finding the equities with plaintiff and ordering a decree granting the relief prayed in the bill. A decree in pursuance of the opinion was entered December 24, 1914 (R. 40). Thereafter, on January 15, 1915, the court of its own motion having come to the conclusion that there was probable error in the decree of December 24, 1914, directed a re-argument (R. 44). Re-argument was had on January 23, 1915, and a final decree (R. 44) dismissing the bill in accordance with the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia, Appellant, vs. Adams Express Company (R. 45, and 219 Fed. 794) was entered on that day. The decree shows that counsel for complainant objected in open court to the vacation and setting aside of the decree of December 24, 1914, on the ground that the laws of West Virginia set forth in the pleadings are repugnant to the commerce clause of the Constitution of the United States and the Fourteenth Amendment, and that if the application of the laws of West Virginia to the interstate commerce disclosed in evidence is authorized by the Act of Congress known as the Webb-

Kenyon Law, that said law is repugnant to the commerce clause and the Fifth Amendment of the Constitution. The appeal to this court was allowed on presentation by complainant of its petition for appeal and assignments of error in open court.

Jurisdiction of the Court.

The appeal to this court is taken under section 238 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as a case which involves the construction or application of the Constitution of the United States, and in which the constitutionality of a law of the United States is drawn in question, and in which the constitution and laws of a state are claimed to be in contravention of the Constitution of the United States.

Errors Relied On.

The assignment of errors appears at R. 54. We contend that the lower court erred;

1. In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In construing the constitution and law of West Virginia as prohibiting a liquor dealer in another state

from advertising by letters mailed to citizens of West Virginia, the sale of liquors in such other state, to be transported and delivered in pursuance of such sales to consignees in West Virginia.

We contend further that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment.

ARGUMENT.

I.

THE WEST VIRGINIA LAW DOES NOT UNDERTAKE TO PREVENT THE CARRIAGE AND DELIVERY OF INTERSTATE SHIPMENTS OF LIQUOR TO CONSIGNEES WHO HAVE PURCHASED THE SAME OUTSIDE OF THE STATE OF WEST VIRGINIA FOR THEIR PERSONAL USE.

The ex parte injunction issued by the Circuit Court of Tucker County against defendant, in effect holds that the West Virginia law prohibits the interstate shipment and delivery of liquor shipments for personal use, when the sale of such liquors outside of West Virginia was preceded or induced by the seller through the method of advertising his product by United States mail. The Supreme Court of Appeals of West Virginia has not construed the law.

In State of West Virginia vs. Adams Express Co., 219 Fed. 331, in the District Court for the Western District of West Virginia, decided October 19, 1914, District Judge Keller held that the West Virginia law did not deal with the subject matter of the sale of liquors by dealers outside of West Virginia to citizens of West Virginia for their personal use, or the interstate transportation of such liquors in pursuance of such sales, or the solicitation of orders by such dealers from such purchasers through the medium of the United States mails. On

appeal the United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia, Appellant, vs. Adams Express Co., 219 Fed. 794, decided January 13, 1915, reversed this decision. In the court below District Judge Rose construed the West Virginia law (R. 34) in the same manner that it was construed by District Judge Keller in 219 Fed. 331. The final judgment was entered, not as the result of any change of opinion by the court below, but solely in deference to the decision of the United States Circuit Court of Appeals for the Fourth Circuit in 219 Fed., at p. 794 (R. 45).

The West Virginia law, on its face, discloses no purpose to deal with the subject matter of buying and selling liquors outside the state of West Virginia and delivering them to consignees in that state for their personal use.

That law was enacted February 11, 1913, becoming effective July 1, 1914, in pursuance of an amendment to the constitution, ratified at the general election of November 5, 1912, which provided:

> "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state.
>
> Provided, however, that the manufacture and sale and keeping for sale of such liquors for

> medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

The amendment to the constitution deals with the subject of "the manufacture, sale and keeping for sale of liquors . . . . . in this state." The title of the prohibition law indicates that it was intended to be confined to the same subject matter, to-wit, the manufacture, sale and keeping for sale of liquors. It reads:

> "An Act to prohibit the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except the manufacture, sale and keeping for sale for medicinal, pharmaceutical, mechanical, sacramental or scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes as regulated and provided for by this act; and to enforce the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve; and making the state tax commissioner ex officio state commissioner of prohibition, and defining his duties; and providing for the enforcement of this act and providing penalties for the violation thereof."

The material sections of the law are as follows:

Section 1 defines the meaning of liquors under the law.

Section 2 enacts that, except as thereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors are forever prohibited.

Section 3 provides:

> "Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two or more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense,

or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.

An indictment for any first offense under this section shall be sufficient if in the form or effect following:

State of West Virginia,

County of .....to-wit:

In the Circuit Court of .....County:

The grand jurors in and for the body of the said county of ....., upon their oaths, do present that A. B., within one year next prior to the finding of this indictment, in the said county of ....., did unlawfully manufacture, sell, offer, keep, store and expose for sale and solicit and receive orders for liquors, and absinthe and drink compounded with absinthe, against the peace and dignity of the state."

Section 4 exempts from the provisions of the law manufacture of wine or cider within the state for do-

mestic consumption; the manufacture and sale to druggists of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes or wine for sacramental purposes; the sale by druggists of pure grain alcohol for such purposes and also of preparations containing alcohol which comply with the West Virginia Pharmacy Law, or the national pure food law. But the sale of such exempted products may be made only upon medical prescription and under the conditions set forth in said section.

Section 6 provides a penalty against any person keeping or maintaining a club house or other place in which any liquor is received or kept for the purpose of use, gift, barter or sale, or for distribution among the members of the club or association.

Section 8 provides:

> "If any person shall advertise or give notice by signs, bill-board, newspapers, periodicals or otherwise for himself or another of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill-boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than five hundred dollars."

Sections 9, 10, 11, 12, 13 and 14 provide procedure for the enforcement of the law by warrant, arrest, indictment and abatement as for a public nuisance.

Sections 15, 16, 17 and 18 contain provisions authorizing the state tax commissioner as ex officio state commissioner of prohibition to enforce the provisions of the law.

Section 19 provides:

> "All express companies, railroad companies and transportation companies within this state are hereby required to keep books in which shall be entered immediately upon receipt thereof the name of every person to whom liquors are shipped; the amount and kind received; the date when delivered, and by whom, and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his name in person to such record, which book shall be open to the inspection of any state, county or municipal officer in this state, at any time during business hours of the company. Such books shall constitute prima facie evidence of the facts therein stated, and be admissible as evidence in any court in this state having jurisdiction, or in any manner empowered with the enforcement of the provisions of this act. Any employe or agent of any express company, railroad company or transportation company knowingly failing or refusing to comply with the provisions of this section, shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars

and may be imprisoned in the county jail not less than thirty days nor more than six months."

Sections 20, 21, 22, 23 and 24 contain provisions governing procedure which are not material here.

Section 25 repeals certain specified sections of the Acts of 1909 and all other acts and parts of acts inconsistent with the provisions of this act.

Section 26 provides that the act shall take effect July 1, 1914.

Taken by its four corners and read as a whole, in connection with the constitutional amendment, the law appears to be an ordinary prohibition law dealing only with the subject matter of the manufacture, sale and keeping for sale of liquors within the state of West Virginia and not with the subject matter of interstate transportation and delivery of liquors purchased in other states to consignees in West Virginia for personal use. The law does not contain any prohibition against carriers transporting and delivering interstate shipments of liquor as does the Kentucky statute, involved in Adams Express Co. vs. Kentucky, pending here, and No. 271, October Term, 1914. Carriers are exempted from the penal provisions of the West Virginia law and cannot commit any of the offenses defined in Section 3. Section 19 is the only section that creates an offense that can be committed by a common carrier or its agents, to-wit, the offense of failing to keep the records provided for in that section. A law of West Virginia which undertook to stop interstate traf-

fic in liquors for personal use would raise grave constitutional questions. If the legislature of West Virginia intended to enact a law of such doubtful validity it should have done so in clear and unmistakable terms. It is not the duty of the court to construe this law as one dealing with any other subject matter than that set forth in the title and provided for in the constitutional amendment, to-wit, "The manufacture, sale and keeping for sale" of liquors in West Virginia.

If a statute is reasonably susceptible of two interpretations, that one will be adopted by which the decision of grave constitutional questions is avoided.

United States vs. Delaware & Hudson Co., 213 U. S. 366.

C. N. O. & T. P. Ry. Co. vs. Kentucky, 115 U. S. 321.

Knights Templars, etc., vs. Jarman, 187 U. S. 197.

The same principle of construction is recognized by the highest court of West Virginia. In Edgell vs. Conaway, 24 W. Va. 747, it was said:

> "A court will not pass on the constitutionality of a statute, unless a decision on that very point is necessary to the determination of the case."

State of West Virginia vs. Adams Express Co., 219 Fed. 794, was a bill in equity filed by the state in a state court to enjoin the Adams Express Company from delivering to consignees in West Virginia, liquors thereafter to be shipped into that state by one Beigel,

a resident of Cincinnati and the agent of the Pabst Brewing Company of Milwaukee, Wisconsin, "unless the consignees of any such liquors can show to the satisfaction of the defendant express company, its agents, representatives and employes, that he, without solicitation from said Beigel, or any of his agents, representatives, or employes, ordered the consignment of liquors for his personal, lawful use without having received from said Beigel or any of his agents, representatives or employes, advertisements or letters soliciting orders for liquors, or price-lists or order blanks advertising or soliciting from the consignee orders for liquors." The case was removed into the United States District Court for the Southern District of West Virginia by defendant Adams Express Company, where, upon argument, a temporary order of injunction of the state court was dissolved and the bill dismissed. On appeal by the state the Circuit Court of Appeals reversed this judgment upholding the contention of the state that the express company could not legally transport and deliver interstate shipments of liquor for personal use where the consignees had been "induced to order from Beigel by solicitation through circulars and price-lists, expressly forbidden and made criminal by section 8 of the statute," and that the fact that such "solicitation" was carried on by mail between Cincinnati, Ohio, and Charleston, West Virginia, was immaterial. The court held, however, that the relief by way of injunction was not dependent on the fact that the shipments there involved had originated

in orders which the consignees had been induced to make on account of solicitation by advertising through the mails; but that the state was entitled to enjoin the interstate transportation and delivery of all shipments for personal use under that part of section 3 of the West Virginia prohibition law, which provides:

> "and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof if made by such carrier to the consignee, his agent or employe."

The West Virginia Law is not to be construed as dealing with the advertising through the mails of interstate sales for personal use.

We contend that section 8 of the law which prohibits the advertising of the sale or keeping for sale of liquors, the circulation of price-lists and order blanks and the permitting of liquor advertisements to be maintained upon property, refers only to advertising the sale or keeping for sale of the liquors, the manufacture, sale and keeping for sale of which are forbidden in West Virginia; and that the section does not deal with the advertising of the sale or keeping for sale of liquors to be sold outside the state of West Virginia.

If it should be contended that that part of section 3 which makes it an offense "to solicit or receive orders for any liquors" is involved in this case, similar

considerations apply. The offense of soliciting or receiving orders under section 3 is only the soliciting and receiving orders for the sale of those liquors which the act prohibits from being manufactured or sold within the state. We suggest also that properly construed section 3 applies only to personal solicitation in the state and that this is shown by the blanket form of indictment provided in that section which permits the state to charge generally that the defendant "did unlawfully manufacture, sale, offer, keep, store and expose for sale and solicit and receive orders for liquors" in a particular county. That this is the construction is shown also by the juxtaposition in the statute and in the form of indictment of the words "sale or keep, store, offer or expose for sale, or solicit or receive orders." If the words "solicit or receive orders" are construed to mean solicitation by mail from a point outside the state and the reception for orders for liquors at such point by citizens of another state, these words are the only words in the section which are not confined to transactions within the state, because manifestly the state has not undertaken to punish the selling, keeping and storing of liquors at places outside the state. The state contends that section 3 or section 8, or both, made it an offense for the James Clark Distilling Company to send by mail from its place of business at Cumberland, Maryland, advertising matter and order blanks into West Virginia, although neither section makes any direct reference to such interstate communication carried on by United States mail. In R.

M. Rose Co. vs. State, 133 Ga. 353, 65 S. E. 770, the Supreme Court of Georgia held that under the commerce clause of the constitution, an indictment charging that defendant, who lived in Chattanooga, Tennessee, solicited orders for the sale of intoxicating liquors by a circular sent through the mails from Chattanooga to a person living in Georgia did not state an offense.

The construction of section 3 and 8 which we contend for is that which was adopted by the Supreme Court of Appeals of West Virginia in State vs. Wheat, 48 W. Va. 259, involving a statute similar in terms to the prohibition law involved in this case. Wheat was a licensed liquor dealer in Ohio County, West Virginia, and was indicted in Brooke County for mailing circulars to persons in Brooke County, where he had no license, under an Act of 1891, providing that no one without license shall "sell, offer for sale, or solicit or receive orders for spirituous liquors." The Supreme Court of West Virginia reversed a conviction, saying:

> "It would seem immaterial that the law confines the license to do business at a particular place or one county, since the solicitation and receipt of orders are not for sale and delivery in other counties, but for sale to be executed as consummated contracts at the place and in the county designated in the license; that is the place of sale."

The court drew a distinction between that case and the case of State vs. Swift, 35 W. Va. 542, in which a conviction was sustained on the ground that the agent

of a licensee was personally present, receiving the order in a county where he had no license.

The court said:

> "I cannot think that the statute designed to go so far as to prohibit one having a wholesale liquor license in Ohio County from advertising his business, by newspapers and circulars in other counties. Again, there may be question whether the offense was committed in Brooke County, as the circulars were left in the mail in Ohio County, and it may be said the act was there complete, etc."

In enacting the present law the legislature of West Virginia may be supposed to have had these decisions in mind. The principles of construction adopted in State vs. Wheat, are applicable to the present statute in support of the argument that it was not intended to prohibit a licensed dealer in Cumberland, Maryland, from advertising the sale of liquors there by newspapers and circulars mailed into West Virginia.

The law should not be construed as undertaking to make the place of delivery in West Virginia of interstate shipments for personal use, the place of sale.

In respect to that part of section 3 of the law which makes the place of delivery the place of sale and upon which the decision of the court below was based, we submit that this section was not intended to deal with the subject matter of selling liquors outside of West Virginia and their interstate transportation, but was merely intended to determine the place of sale

of a shipment between two points in the state of West Virginia, and to fix the venue of the offense. This construction is fortified by reading the portion of section 3 above quoted in connection with that part of section 3 which immediately follows it, wherein the form of indictment for the offense of sale, keeping for sale, etc., liquors in a particular county in West Virginia is provided for. To construe the law as affecting interstate sales would make it unconstitutional under Adams Express Company vs. Kentucky, 206 U. S. 129, where it was held, as shown by the syllabus:

> "A statute of Kentucky, making penal all shipments of liquor 'to be paid for on delivery, commonly called C.O.D. shipments,' and further providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one state to another an attempt to regulate interstate commerce and beyond the power of the state."

II.

THE STATUTE OF WEST VIRGINIA CANNOT CONSTITUTIONALLY MAKE IT AN OFFENSE FOR A LIQUOR DEALER AT CUMBERLAND, MARYLAND, TO SOLICIT BY MAIL ORDERS FROM CITIZENS OF WEST VIRGINIA FOR THE SALE OF LIQUORS AT CUMBERLAND AND THEIR TRANSPORTATION IN INTERSTATE COMMERCE.

Assuming for the sake of argument that it was the intention of the West Virginia statute to make it an offense for the James Clark Distilling Company to mail its circulars at Cumberland and have them carried into West Virginia, and assuming for the sake of argument that the effect of a violation of this provision of the West Virginia law is to deprive the distilling company of its rights to make shipments in interstate commerce in pursuance of orders received by such solicitation, such results cannot follow because the statute so construed would be unconstitutional. The only case directly in point is Rose vs. State, 133 Ga. 353, which so holds. Delamater vs. South Dakota, 205 U. S. 93, involved the personal solicitation in the state of South Dakota of orders for the interstate sale of liquors and is not in point. The Supreme Court of Georgia had the Delamater case before it when Rose vs. State was decided, and said in regard to that case:

> "This decision was declared to have been authorized 'by the spirit of the Wilson Act.' But would it be contended for a moment that,

> under either the letter or the spirit of that act, if Delamater had never gone into the state of South Dakota at all, but had written and posted in Minnesota a letter offering liquor for sale there, he would have been subject to the police laws of South Dakota, so as to be required by its authorities to take out a license authorizing him to write and mail letters in Minnesota? If he had not done so, could he have been indicted and extradited from Minnesota because he wrote and mailed letters there without a license from South Dakota? To ask the question is to answer it. The Delamater case is no authority for holding that one state can require a resident and citizen of another state to obtain a license to write in the latter state and send through the United States mail letters relating to what is still held to be a subject of commerce, and therefore, between the states, of interstate com merce."

The distinction between personal solicitation of orders and solicitation by United States mail is clear and was noticed by the Supreme Court of Georgia in Kirkpatrick vs. State, 138 Ga. 794, 76 S. E. 53, which was a prosecution against an agent of a non-resident liquor dealer for personally soliciting orders in the state of Georgia for the sale of intoxicating liquors to be shipped into that state. The court held that the Georgia statute making such solicitation an offense was valid under the decision in Delamater vs. South Dakota. The court referred to Rose vs. State, 133 Ga. 353, saying:

"Nothing here ruled is in conflict with any ruling made in the Rose case, nor is there anything in the Rose case holding that the doctrine of the Delamater case would be irrelevant to the present. The Rose case was not one in which the agent came personally into this state and solicited orders, but was one in which orders were solicited by letters sent in the United States mail, posted beyond the limits of this state, and at a place where it was lawful to sell intoxicating liquors. The ruling there made distinctly recognized that made in the Demamater case, but held it inapplicable to the facts of that case. The distinction there made is not applicable in the present case, the agent being personally in this state soliciting orders."

Hayner vs. State, 83 Ohio St. 178, and Zinn vs. State, 88 Ark. 273, 114 S. W. 227, involved the solicitation of orders for the sale of liquors by mail where the whole transaction occurred within the limits of the state and where the shipments proposed were intrastate shipments. No federal question was involved in those cases except the question whether the state law was in violation of that part of article I. of section 8 of the constitution which empowers Congress to establish postoffices and post roads.

Maine vs. Bass Publishing Co., 104 Me. 288, was a proceeding against the publisher of a newspaper in the city of Bangor, Maine, for publishing advertisements there of liquors for sale in Boston, Massachusetts. The publication of such advertisements is an act com-

mitted wholly within the confines of a state and the principles governing such a case are analogous to those enforced in Delamater vs. South Dakota where an individual does, within the state, an act forbidden by a state law. The case did not involve any question of the use of the United States mails in interstate commerce.

The Circuit Court of Appeals in State of West Virginia vs. Adams Express Co., 219 Fed. 794, referred to In re Palliser, 136 U. S. 257, and United States vs. Thayer, 209 U. S. 39. These cases are not in point.

In re Palliser was an indictment in a District Court of the United States on the charge of offering to pay money to an officer of the United States with intent to influence him to commit an act in violation of his public duties. The offer was made by the mailing of a letter at New York addressed to the postmaster in New London, Connecticut. Defendant claimed that the evidence showed no offense within the jurisdiction of the courts of the United States for the district of Connecticut. The court held that the District Court of the United States for the District of Connecticut had jurisdiction of the offense. That case involved merely the power of Congress under the constitution to fix the venue of an offense against the laws of the United States. It did not involve as does this case, any question of the power of a state to make it an offense to use the United States mail in connection with an interstate commerce transaction.

United States vs. Thayer held that a charge of soliciting a contribution of money for political purposes from an employe of the United States in a postoffice building of the United States in violation of the civil service act was sustained by evidence that defendant had addressed a letter soliciting such contribution and that the same was delivered by United States mail to an employe of the government within a postoffice building. This case establishes that solicitation in violation of the United States statute may as well be committed by writing a letter as in person. The case does not involve any question of the power of a state to deal with the solicitation by mail of orders for shipments to be made in interstate commerce.

There is nothing in the Webb-Kenyon Law which authorizes the state of West Virginia to penalize a citizen of Maryland for writing in that state and mailing into West Virginia a proposal to sell and ship liquors for personal use. The Webb-Kenyon Law deals with the transportation only of liquors intended to be used for certain purposes, and not with the solicitation of orders for liquors to be transported.

III.

THE STATUTE OF WEST VIRGINIA CANNOT CONSTITUTIONALLY MAKE THE PLACE OF DELIVERY IN WEST VIRGINIA, OF AN INTERSTATE SHIPMENT FOR PERSONAL USE, THE PLACE OF SALE, AND PROHIBIT THE INTERSTATE CARRIER FROM DELIVERING SUCH SHIPMENTS.

Such a state statute is a direct interference with interstate commerce in violation of the commerce clause of the constitution. Under the decisions of the court in Adams Express Co. vs. Kentucky, 206 U. S. 129, and in Louisville & Nashville R. R. Co. vs. Cook Brewing Co., 223 U. S. 70, it must be conceded that the West Virginia statute is unconstitutional, unless it is given validity by the act of Congress of March 1, 1913, known as the Webb-Kenyon Law. Both of the cases above cited involved a Kentucky statute which undertook to make the place of delivery of an interstate shipment the place of sale, and to punish the carrier for delivering such shipments in dry territory in Kentucky. In Adams Express Co. vs. Kentucky, 206 U. S. 129, the court reversed a judgment of conviction against an agent of the express company for violating this statute. In Louisville & Nashville R. R. Co. vs. Cook Brewing Co., 223 U. S. 70, the court held that the prohibitions of this statute furnished no valid reason for a refusal by the railroad company to carry the brewing company's shipments from Indiana to consignees in dry territory in Kentucky.

IV.

A CITIZEN OF WEST VIRGINIA HAS THE CONSTITUTIONAL RIGHT TO ORDER AND HAVE DELIVERED TO HIM, IN INTERSTATE COMMERCE, LIQUORS FOR HIS PERSONAL USE.

State vs. Gilman, 33 W. Va. 146, 10 S. E. 283, was an indictment charging that defendant did unlawfully, and without a license therefor, "sell, offer, and expose for sale, and solicit and receive orders for and keep in his possession for another, spirituous liquors, wine, porter, ale, beer and drink of a like nature, etc." On demurrer to the indictment the Supreme Court of Appeals of West Virginia held the statute unconstitutional under the constitution of West Virginia and also held it in contravention of the Fourteenth Amendemnt of the Constitution of the United States, in that it undertook to make it an offense for the citizen to keep liquors in his possession for another. The court said:

> "The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public, and, therefore, the statute prohibiting such keeping in possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification and therefore void."

To the same effect are:

State vs. Williams, 146 N. C. 618, 61 S. E. 61.
Eidge vs. Bessemer, 164 Ala. 599, 51 Sou. 246.
Commonwealth vs. Campbell, 133 Ky. 50.
Martin vs. Commonwealth, 153 Ky. 784.
Calhoun vs. Commonwealth, 154 Ky. 70.
Adams Express Co. vs. Commonwealth, 154 Ky. 471.
Commonwealth vs. Smith, 163 Ky. 227.

In the last mentioned case the court of Appeals of Kentucky had under consideration an act of the legislature approved March 9, 1914, providing that in prohibited territory it should be unlawful for any person "to keep, store or possess any such liquors in any room, building, or structure other than the private residence of such person." This statute was held unconstitutional as exceeding the authority of the legislature by prohibiting the possession of liquors for an innocent purpose with which the police power of the state is not concerned. At p. 234 the court uses the following language:

> "The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to

enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution. State vs. Williams, supra; Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205. We have in force a statute prohibiting the possession of intoxicating liquor in prohibited territory for the purpose of sale. Under this statute very slight evidence is sufficient to secure a conviction. Where, therefore, the purpose of the owner is unlawful, the above statute is effective. Here it is sought to go one step further and make the possession for an innocent purpose considered from the standpoint of the police power as much of an offense as if the possession were for an unlawful purpose. Manifestly, if the legislature has the power to prohibit such possession at places other than one's private residence, then it has the like power to prohibit such possession even at a private residence, and this is exactly what was held in Commonwealth vs. Campbell, supra, could not be done. There must of necessity be limits beyond which the legislature cannot rightfully go. We think that limit is reached when it prohibits such possession for sale or other unlawful purpose. It cannot go further and prohibit such possession or limit the place of possession where

> the liquors are intended for one's own use, and, therefore, for a purpose with which the police power of the state is not concerned. It will not do to say that because some persons may evade the law as it now exists, others who have no intention of violating the law should be denied their constitutional rights. As this is the effect of section 4 of the act in question, we concur in the ruling of the circuit judge that the section is unconstitutional and void."

In this connection the language of Mr. Justice White, delivering the opinion in Vance vs. Vandercook (1), 170 U. S. 439 (1898), is important. At p. 455 he said:

> "On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States."

V.

THE WEBB-KENYON LAW DOES NOT AUTHORIZE THE APPLICATION OF A STATE STATUTE TO AN INTERSTATE SHIPMENT FOR LAWFUL, PERSONAL USE.

The law, after having been returned to the Senate by President Taft, with objections thereto, was enacted March 1, 1913, as Ch. 90, 37 Stat. 699. The opinion of the Supreme Court of Delaware in VanWinkle vs. State, 91 Atl. 385 (June 16, 1914), gives the history of the law during its consideration by Congress. It reads:

> An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.
>
> "Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in viola-

tion of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia vs. Adams Express Company, 219 Fed. 794 (R. 45), considered it so clear that under the Webb-Kenyon Law a state had power to prohibit the interstate transportation of liquors for personal use, that the interpretation of the law permitted no resort to extraneous sources. On the other hand, the Supreme Court of Delaware in VanWinkle vs. State, 91 Atl. 385, did not consider it proper to refer to the debates in Congress, because the law was so clear the other way. In Adams Express Company vs. Commonwealth, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the Court of Appeals of Kentucky referred to the debates as a proper source of information in construing the law. This difference of opinion justifies us in calling the attention of the court to what was said in Congress on the subject of shipments for personal use.

If there is any doubt as to the construction or application of a statute, contemporary history which shows the evils intended to be remedied may be referred to by the courts.

Johnson vs. Southern Pacific Ry. Co. 196 U. S. 19.

Anderson Net & Twine Co. vs. Worthington, 141 U. S. 468.

Holy Trinity Church vs. United States, 143 U. S. 457.

Dunlap vs. United States, 173 U. S. 65.

Downes vs. Bidwell, 182 U. S. 244.

The debates that took place in Congress and before the Judiciary Committee of both the House and the Senate, made it very plain that it was not the intention of the proponents of the Webb-Kenyon Bill to prevent the individual from getting liquor for his personal use.

At the hearings before the Committee of the Judiciary (Sub-Committee 3) on January 11th, 1912, Honorable E. Y. Webb of North Carolina, one of the authors of the bill, in response to the question of the other members of the committee said that the only purpose of the bill was to prevent the re-sale of liquor in prohibition territory by the consignee, and further says that, "This is the sole purpose of this bill" (pp. 9, 10).

On page 11 of the same document appears the full statement of Mr. Carlin, chairman of the Sub-Committee, and Mr. Webb, as follows:

Mr. Carlin:

> "The purpose of the bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal."

Mr. Webb:

> "Yes, sir; that is the object. This bill has been criticized by some of our temperance friends, because it does not undertake to pro-

hibit the shipment of whisky for individual use. As long as the Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky; I do not think a law will be passed prohibiting the shipment of whisky for a man's personal use."

On page 13, Mr. Webb says:

"This bill does not in anywise affect the right of a man to buy whisky for his personal use."

On page 26 appears the statement of the Reverend Edwin C. Dinwiddie, Washington Representative of The Anti-Saloon League of America, who was the most active and aggressive worker in behalf of the bill, as follows:

"This bill of itself interferes with no man's rights to import intoxicating liquors for the purpose of personal consumption."

At p. 28, he says:

"If they are there for a lawful purpose . . . . that is, for personal or family use and not to be used in violation of any state law . . . nobody wants to interfere with these liquors and nobody proposes to interfere with them."

At page 33, he says:

"A man can have liquor shipped in and delivered at his residence for his personal use."

On page 2851 of the Congressional Record, February 8th, 1913, Mr. Roddenbery, a supporter of the bill says:

"It does not interfere with the shipment or reception of liquors for lawful, personal consumption or for any purpose not prohibited by state law."

On December 19th, 1912, page 865, Congressional record, Senator William S. Kenyon says:

"This bill, if enacted, would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors nor to prohibit the shipment of intoxicating liquors for personal use, nor to stop the use of intoxicating liquors for sacramental purposes."

He said further:

"There is no purpose in this bill, and the language can not be distorted into the idea so freely circulated in the literature now being distributed by those opposed to this bill, that it destroys the right of a man to the personal use of intoxicating liquor" (Cong. Rec., Dec. 19, 1912, p. 865).

"If liquors are shipped with the intent to be used by the person for his own personal use, and in no way to violate the law of a state, then they are subjects of commerce" (Cong. Rec., Dec. 19, 1912, p. 869).

"There is no practical trouble with the personal use question. There is no attempt on the part of anybody to construct a law that shall prevent personal use or prevent shipment for personal use, and this bill does not do so" (Cong. Rec., Dec. 19, 1912, p. 874).

In the course of the speech in opposition to the bill

of Hon. Thos. H. Paynter of Kentucky in the Senate on February 7, 1913, Senator Kenyon said:

> "I do not want to interfere with the orderly course of the Senator's argument, but the statement which the Senator makes that this bill will stop the purchase of liquor for personal use is one that has been made a great deal and one which I absolutely deny."

Assuming that the West Virginia statute, properly construed, intended to authorize the state to stop the importation of liquors for the personal use of a citizen who had ordered them as the result of solicitation through the mails, and assuming that the West Virginia statute undertakes to make the place of delivery in West Virginia of interstate shipments for personal use the place of sale, the state derives no authority from the Webb-Kenyon Law to so interfere with interstate commerce. The Webb-Kenyon Law does not undertake to give the statutes of a state extra-territorial effect or to permit a state to make an innocent and lawful act done in another state an offense against its laws. There is nothing in the Act of Congress which forbids the transportation of liquors in interstate commerce, or permits the state law to apply, unless the use intended to be made of the liquors at destination is one that violates a valid law of the state. Congress has not undertaken to prohibit interstate transportation in cases where the state forbids interstate transportation on the ground that the transportation was preceded by the solicitation of an order.

Nor has congress forbidden the interstate transportation in cases where the state prevents the interstate transportation by making the delivery at destination an offense.

To construe the Webb-Kenyon Law as forbidding interstate transportation when the consignee does not intend to use the liquors in violation of a valid law of the state, is not only contrary to the plain wording of the law, but attributes to Congress an intention to surrender to the states the power to regulate commerce, which the people delegated to Congress by the constitution. Supposing that Congress may surrender such power to the states as to liquors intended to be used in violation of a state law, it is quite another thing to say that Congress assumed to surrender that power as to liquors not to be used in violation of a state law.

In Adams Express Co. vs. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 343, (June 17, 1913), it was contended that by reason of the enactment of the Webb-Kenyon Law, Section 2569 a, Kentucky Statutes, applied to interstate shipments. The Court of Appeals denied this contention and reversed the conviction, holding that the Webb-Kenyon Law permitted the application of the state statute to the interstate transaction only where the consignee intended to use the liquors illegally after delivery, and that it did not permit the application of the state statute forbidding the transportation, and making the place of delivery the place of sale, to interstate shipments of liquor intended for personal use.

After referring to the evidence which showed that the consignee intended to use the liquors personally the court said:

> "This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. Calhoun vs. Commonwealth, 154 Ky. 70, 156 S. W. 1077; Martin vs. Commonwealth, 153 Ky. 784, 156 S. W. 870; Commonwealth vs. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172."

The court said further:

> "It is, however, insisted for the commonwealth that, although the consignee of the whisky in this case may have received it for a lawful purpose, it was nevertheless a violation of law for the carrier to deliver it to him. The argument in this behalf being that as section 2569 a makes it unlawful for a carrier to bring into or deliver in local option territory any intoxicating liquors, subject to the exception mentioned in the section, the fact that the person to whom the liquor is delivered intends to possess and use it lawfully, does not excuse the carrier from doing a thing that is forbidden by the law of the state as expressed in this section.

This argument being rested on the proposition that, as it would be unlawful for a carrier, as an intrastate transaction, to deliver this liquor, the Webb-Kenyon Law makes the delivery of it by the carrier unlawful, although it be an interstate transaction, as both interstate and intrastate shipments are now on the same footing and are to be treated precisely alike. In short, it is said that in every case in which it would be unlawful for a common carrier to receive for shipment liquor at a point in this state where it might be sold, and carry and deliver it to the consignee at a point in this state where its sale was prohibited, it would also be unlawful for a common carrier to receive it for shipment at a point outside of the state and deliver it to the consignee at a point in this state where the sale of liquor was prohibited. We do not, however, agree with counsel for the commonwealth in this broad statement of the effect of the Webb-Kenyon Law. There is the same distinction now that there was before the enactment of this law between intrastate and interstate shipments of liquor, except when the interstate shipments come within the prohibition of the Webb-Kenyon law. It does not follow that because it would be unlawful for a carrier to deliver liquor as an intrastate transaction that it would also be unlawful for it to deliver, under like circumstances, liquor as an interstate transaction. For example, we held in Adams Express Co. vs. Commonwealth, 129 Ky. 420, 112 S. W. 577, 33 Ky. Law Rep. 967, 18 L. R. A. (N. S.) 1182, that

under section 2569 a a common carrier was forbidden to carry liquor from a point in this state at which it might be lawfully purchased to a point in the state where the local option law was in force and there deliver it to the consignee; and the validity of this statute as applied to intrastate transactions was recognized by the Supreme Court of the United States in the Cook Brewing Co. Case. But we have also held in C. N. O. & T. P. Ry. Co. vs. Commonwealth, 126 Ky. 563, 104 S. W. 394, 31 Ky. Law Rep. 954, and many other cases, as did the Supreme Court in the Cook Brewing Co. Case, that section 2569 a was inoperative when attempted to be applied, under like circumstances, to interstate transactions.

It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the constitution and laws of the state, and the opinions of this court, that it was not. This being true, the aid of the Webb-Kenyon Law cannot be invoked to secure the punishment of the carrier, as it does not prohibit a common carrier from receiving, carrying and delivering, as an interstate transaction, intoxicating liquor to the consignee when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the laws of this state, or withhold

from such a transaction the protection afforded by the commerce clause of the federal constitution. As to this character of transaction, the Webb-Kenyon Law has no application, and having no application, the law, as it existed before the enactment of this legislation, is in force, and, being in force, the carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state."

In Adams Express Company vs. Commonwealth, 160 Ky. 66, 169 S. W. 603 (October 6, 1914), the same court affirmed this rule, saying:

"Unless the liquor is intended by some person interested therein to be received, possessed, sold or used in violation of the law of the state, the act does not apply to it. We accordingly held in Adams Express Company vs. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342, that the act does not apply to shipments of whisky from another State into this State, where the consignee gets it simply for his personal use, there being no law of this State making it unlawful for a person to receive or possess intoxicants in this State for his own personal use. That decision followed the plain language of the act, as well as the express construction put upon it by Mr. Webb and Senator Kenyon in their speeches in advocacy of it on

> the floor of Congress; and the same view has been taken so far as we are advised by all the courts of last resort, before whom the question has been presented. Atkinson vs. Southern Express Co., 94 S. C. 444, 78 S. E. 516, 520, 48 L. R. A. (N. S.) 349; Palmer vs. Southern Express Co. (Tenn.) 165 S. W. 236; VanWinkle vs. State of Delaware (Del.) 91 Atl. 385."

In VanWinkle vs. State of Delaware, 91 Atl. 385 (June 16, 1914), in the Supreme Court of Delaware, not yet officially reported, overruling State vs. Grier, 88 Atl. 579 (Court of General Sessions of Delaware; October 8, 1913), the opinion by Judge Woolley, now United States Circuit Judge for the Third Circuit, shows that an agent of Adams Express Company was convicted under the "Hazel Law" of Delaware, for delivering a shipment of liquor in dry territory in Delaware, which had been purchased by the consignee in Philadelphia for his personal use. The "Hazel Law" was enacted after the passage of the Webb-Kenyon Law, and for the purpose of permitting the state to take advantage of the supposed jurisdiction conferred on the states as to interstate shipments by the Webb-Kenyon Law. The Hazel Law provided in Section 1:

> "That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier or agent, handle, deliver or distribute in local option territory, any spirituous, vinous or

malt liquor, regardless of the name by which it may be called."

Judge Woolley in an elaborate opinion reviewed the whole history of the subject, including the history of the Webb-Kenyon Law, as to which he said:

> "The Webb-Kenyon Bill, after its introduction, was subjected to vigorous debate and important amendment, with the result that the popular impression of that legislation has been gathered more from the controversy that revolved about it than from knowledge of the measure itself. It is not unnatural, therefore, that the popular conception of the law is that it confers upon a state the power absolutely and totally to prohibit the importation of liquor for any purpose, while an examination of the precise terms of the law shows a very different purpose and a very different power."

At 91 Atl., p. 398, he said:

> "Under this state of the law, the first question therefore is: How far and to what extent are the prohibitions of the Hazel Act authorized, aided or validated by the Webb-Kenyon Law, when considered with especial reference to the offense for which the defendant below was indicted? The defendant below, acting as an agent for a common carrier, completed a shipment of liquor from the state of Pennsylvania to a prohibition district in the state of Delaware, by receiving the same and delivering it to the consignee in that district. It is admitted in the case stated that the liquor 'was intended' by the consignee 'to be used by him for his own

consumption,' and 'he did not intend to sell or otherwise unlawfully dispose of the same.' The Hazel Act prohibits the shipment of liquor into the prohibition districts of this state for any purpose (excepting the two designated), whether the liquor be intended to be used in violation of law or not. The Webb-Kenyon Law prohibits the shipment of liquor only when the liquor is intended to be used in violation of the law of the state. **There is thus presented a case of a shipment of liquor for a lawful purpose, in violation of a state statute prohibiting the shipment of liquor for any purpose, enacted under authority of a federal statute, prohibiting the shipment of liquor for an unlawful purpose.** The first question for our determination, therefore, is whether the Webb-Kenyon Law prohibits the act with which the defendant below is charged, or makes valid the prohibition of such an act by a state statute. In other words, does the Webb-Kenyon Law apply to this case, and, if not, is the Hazel Law valid in so far as it prohibits the act committed by the defendant below?

The conclusion reached by the court is stated at p. 405 as follows:

> "But by the Webb-Kenyon Act, Congress expressed its sanction to such a law as the state of Delaware might desire to enact, prohibiting the shipment of liquor from other states into certain districts of this state when it was there to be received, possessed, sold or used in violation of the law of this state. Upon authority of

this act the state of Delaware enacted the Hazel Law prohibiting with like intent the shipment of liquor from other states into prohibition districts of this state, there to be used for unlawful purposes. To this extent the Hazel Law is valid, if the Webb-Kenyon Law is valid. But the state of Delaware went further and by the same law prohibited the shipment of liquor from other states into prohibition districts of this state there to be used for purposes recognized by the act itself to be lawful. For this much of the Hazel Law the state of Delaware was without authority of its own and without the aid of the Webb-Kenyon Act, for the Webb-Kenyon Act did not prohibit, nor did it authorize a state to prohibit, the importation of liquor into a prohibition territory, when the liquor was intended for a lawful purpose. The Hazel Act, therefore, in so far as it prohibits the shipment of liquor from another state into a prohibition district of this state, when the liquor is not intended to be received, possessed, sold or in any manner used in violation of the laws of this state, but is intended for a lawful purpose, is an enactment without constitutional authority, and when invoked in such cases, amounts to an interference with interstate commerce, and is therefore void."

Palmer vs. Southern Express Co., 165 S. W. 236 (February 28, 1914), in the Supreme Court of Tennessee, not yet officially reported, was an action in replevin by Palmer against the express company to compel it to deliver to him at the office of the express com-

pany in Davidson County, Tennessee, a shipment of 15 gallons of liquors which he had purchased at Louisville, Kentucky, for his personal use. By an act of the legislature of Tennessee passed subsequent to the Webb-Kenyon Law it was unlawful;

> "for any person, firm or corporation to ship, carry, transport, or convey any intoxicating liquor into this state, or from one point to another within this state, for the purpose of delivery, or to deliver the same to any person, firm, company, or corporation within the state, except . . . . That nothing in this act shall make it unlawful; . . . . .
>
> 2. For any person to order and have shipped and delivered to him from without the state, for his own use, or the use of the members of his family residing with him, such intoxicating liquor in quantities not exceeding one gallon."

The Supreme Court of Tennessee held that this provision of the Tennessee statute was in contravention of the commerce clause of the Constitution of the United States and was not authorized by the Webb-Kenyon Law. The court after stating that the opinion was not to be misunderstood as holding the Webb-Kenyon Law inapplicable to "sales of liquor made in a foreign state for shipment into this state to be sold or used in violation of the prohibition laws of this state," said, at p. 244:

> "It is perceived that the thing which the act prohibits is the interstate shipment or transportation of the liquors mentioned therein, when

intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state, etc., into which the shipment is made.

It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question."

In Hamm Brewing Co. vs. Chicago R. I. & P. Ry. Co. 215 Fed. 672 (1913), District Judge Willard, by mandatory injunction compelled defendant to carry plaintiff's shipments of beer from Minnesota into the state of Iowa. He said:

"The beer which Moss, a resident of Iowa, ordered from the plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-

> Kenyon Law, while it says that the liquor must not be received, possessed, sold or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments."

Ex parte Peede, 170 S. W. 749 (Court of Criminal Appeals of Texas, October 14, 1914; on motion for rehearing, November 18, 1914), was a prosecution of an agent of Wells Fargo Express Company for violation of the Allison Law of Texas, which, as contended by the state, made it an offense for a carrier to deliver interstate shipments of liquor in dry territory in Texas for the personal use of the consignee. In an exhaustive opinion the majority of the court use the following language in reference to the Webb-Kenyon Law:

> "It is thus seen that Congress, although it had the right to do so, does not prohibit, nor authorize the states to prohibit, interstate shipments of intoxicating liquor, but only prohibits the interstate shipment when intended to be received or possessed to be sold or used in violation of a law of the state. It removed the protecting arm of the interstate commerce clause of the federal constitution thus far and no further, and to hold otherwise, in our opinion, would render, under the decisions of the Supreme Court of the United States, section 5 of

the Allison Law violative of the interstate commerce clause of the Constitution of the United States, and open wide the door to the interstate shipment of intoxicating liquors for both legal and illegal purposes. Congress closed, and authorized the state to close, the door to interstate shipments when such liquors are intended for sale in violation of the law of the state, or to be in any manner used in violation of a law of the state. Thus far Congress saw proper to go and no further. This is made manifest by the remarks of Mr. Webb, the author of the bill, when it was pending in Congress. While considering the bill the following colloquy took place:

'Mr. Carlin. The purpose of this bill is not to interfere with shipments, but simply to prohibit the shipment of liquor for sale where such sale would be illegal?

Mr. Webb. Yes, sir; that is the object. The bill has been criticized by some of our temperance friends because it does not undertake to prohibit the whisky for individual use. As long as our Supreme Court holds that liquor is a legitimate subject of commerce, and as long as men have an appetite for liquor, and as long as the state does not prohibit the drinking of whisky, I do not think a law will be passed prohibiting the shipment of whisky for a man's personal use.'

If the language of the bill was obscure or ambiguous this would be material in construing it. But the language is plain and unambiguous, and that the author used the language he did intentionally and he had not sought, and did not

> intend to prohibit interstate shipment of intoxicating liquors when intended for one's own use, but only when intended to be sold or used in violation of the law in prohibition territory, is manifest."

On motion for rehearing the court adopted as its opinion the opinion of the Supreme Court of Delaware in VanWinkle vs. State, saying that that case "reviews the history of this character of litigation and disposes of every question raised by the state on the motion for rehearing."

Southern Express Co. vs. State, 66 So. 115 (Supreme Court of Alabama, June 30, 1914), was a bill in equity by the state to enjoin the maintenance of the company's warehouses in Morgan County, Alabama, as a liquor nuisance. The Supreme Court reversed a decree of the lower court allowing an injunction. The court holds that no law of the State of Alabama prevents or can, under the Webb-Kenyon Law, prevent the delivery by a carrier of liquors intended for personal use, and that the only ground upon which an injunction against the carrier would be justified would be that the liquors were intended for illegal sale and the carrier has knowledge of that fact. The court said (66 So. 124):

> "In so far as this state is concerned, its laws have no effect upon liquors brought into this state from another state unless, in contravention of the Act of Congress, the carrier has them in its possession for the purpose of delivery or undertakes to deliver them for illegal use in the

state. The laws of this state have no extra-territorial force, and the Webb Bill was not intended to give to our laws any such force. The state of Alabama has nothing to do with sales that may be made in another state. It is, however, interested in the question as to whether a carrier of interstate commerce shall deliver to a consignee in this state an article which the consignee intends to use in this state in violation of a valid state law. The true legal effect of the Webb Bill, construed in connection with our prohibitory statutes, is to prohibit a carrier engaged in interstate commerce from delivering or having in its possession, for the purposes of delivery to a consignee, liquor which has come into its hands and which the consignee intends to use in violation of our laws."

Southern Express Co. vs. City of High Point, 83 S. E. 254 (Supreme Court of North Carolina, October 28, 1914), was an action for injunction by the Southern Express Company against the city officials of High Point to restrain them from enforcing an ordinance of that city against a delivery of interstate shipments of liquor in the city by the express company. The bill was dismissed, the court holding that there was no necessity for a remedy by injunction because "in any prosecution of an indictment under this act, it is a valid defense that the liquor was intended for a lawful purpose, and therefore the courts will not undertake to determine upon injunction proceedings whether shipments of liquor are intended for an illegal or a legal purpose."

In Bristol Distributing Co. vs. Southern Express Company (Supreme Court of Appeals of Virginia, January 12, 1915), not yet reported, the court held that the Bristol Distributing Company, a licensed liquor dealer in Virginia, was entitled to a mandatory injunction against Southern Express Company to compel that company to receive at Bristol, Virginia, shipments of intoxicating liquors destined to points in the state of North Carolina for the personal use of the consignees. The decision was based upon the decision of the North Carolina court in Southern Express Company vs. High Point, to the effect that it being no violation of the law of North Carolina for a carrier to transport and deliver shipments for personal use in that state, such shipments are not prohibited by the Webb-Kenyon Law.

State of West Virginia vs. Adams Express Co. 219 Fed. 331 (Dist. Court, Western District of W. Va., October 19, 1914), was a suit in equity by the state in one of its own courts to enjoin the Adams Express Company from delivering liquors ordered by a citizen of West Virginia for his own personal use from a licensed wholesale dealer outside the state. The Adams Express Company removed the case to the Federal Court, where it was held, as shown by the opinion of District Judge Keller, that;

> "Hence there is nothing in either the Wilson Act or the Webb-Kenyon Act which authorized the state to interfere with the shipment and delivery of liquors ordered by a citizen of West

> Virginia for his own personal use from a licensed wholesale dealer without the state, and it follows that the preliminary injunction awarded by the Circuit Court of Kanawha County should be dissolved and the bill dismissed. I wish it understood that this ruling is made strictly upon the case before me, and has no reference to what might be the duties or obligations of the transportation company in the case of a consignment of liquor intended by the consignee to be resold or used in violation of the laws of West Virginia."

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, in State of West Virginia, appellant, vs. Adams Express Co., 219 Fed. 794, decided January 13, 1915 (opinion printed at R. 45), this decision was reversed.

In the court below the district judge said (R. 38):

> "There is nothing in the act, however, to indicate that the state had any objection to any one obtaining liquor for his own personal use provided he can do so otherwise than by, within the state, buying or making it," and that, "it follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by any one interested therein to be received, possessed, or used in violation of any law of that state."

The conclusion of the court on this point is stated as follows:

> "In this case nothing need be decided other than that the defendant as a common carrier is

bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the state. It has no right to accept for shipment, or to deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that state."

The foregoing cases in the highest courts of Kentucky, Delaware, Tennessee, Texas, Alabama, North Carolina and Virginia, and elsewhere, agree that the Webb-Kenyon Law undertakes to confer on the states no power to interfere with the interstate transportation and delivery of liquors intended by the consignee for lawful, personal use.

On the other hand it is held that where the consignee intends to sell the imported liquors in violation of the law of the destination state, the Webb-Kenyon Law authorized the application of the state law to the interstate shipment.

State vs. United States Express Co., 145 N. W. 451 (Supreme Court of Iowa, February 17, 1914), was an injunction on behalf of the state abating as a nuisance the office of the express company at the city of Ottumwa, Iowa, on the ground that it was delivering interstate shipments of liquor to consignees for purposes of illegal sale, of which fact the company's agent at Ottumwa had notice.

The court found that the consignee of said liquors;

> "was the sole person interested therein, and he intended, all of the time, to receive and possess with intent to sell the beer and liquors in Ottumwa, in violation of the laws of the State of Iowa. . . . The defendant at the time of the delivery of the beer and the liquors to J. Erbacher did not have notice or actual knowledge that he was buying or receiving the same with the intent and purpose of selling it in violation of law, but was in possession of such facts, that upon reasonable inquiry, it would have ascertained he was buying and receiving and holding the beer and liquor with intent to sell the same in violation of the laws of Iowa, and is therefore chargeable with such knowledge" (145 N. W. 453).

At p. 455, the court said:

> "Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act. It does just what the title says it was intended to do, to-wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person interested therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and

substance of the act, and that it has reference to such shipments as are involved in this case clearly appears."

State vs. Doe, 92 Kan. 212, 139 Pac. 1169 (April 11, 1914), was a similar case. It involved a seizure and condemnation under a Kansas statute of a car-load of beer destined to a consignee "engaged in the wholesale liquor business in Cherokee County in violation of law." The first syllabus, by the court, reads:

> "The Webb-Kenyon Act, Prohibiting the Shipping of Intoxicating Liquors into States for Use in Violation of Law, is Constitutional and Valid. Under the Act of Congress of March 1, 1913, entitled 'An act divesting intoxicating liquors of their interstate character in certain cases' (Part 1, 37 U. S. Statutes at Large, Ch. 90, p. 699), intoxicating liquors are recognized as legitimate subjects of interstate commerce only when not intended for sale or use in violation of the laws of the destination state, and the fact that a car-load of intoxicating liquors, seized in bulk at the place in this state to which it was consigned, was still in course of transportation, originating in another state, did not protect the liquor from condemnation consequent upon a judicial determination regularly made that it was intended for unlawful use in Kansas."

Smith vs. Southern Express Co., 82 S. E. 15 (Supreme Court of North Carolina, May 30, 1914), was an action to recover a penalty from the carrier under a statute for refusal to deliver to plaintiff as consignee

an interstate shipment of liquor. The scope of the opinion is indicated by the following statement appearing at p. 17:

> "It thus appears that he (the plaintiff) has no valid license permitting him to sell either as druggist or otherwise, and, it being his avowed intention to sell for profit and by the way of prescription, an act made a misdemeanor by the statute unless a valid license is first obtained, the court will not aid him to this intended breach of the criminal law, nor should it penalize one who, knowing the facts, has declined to deliver the liquor in furtherance of his unlawful purpose."

In order to make the list of cases on the subject complete we refer to two cases in which the Webb-Kenyon Law was discussed in the opinion, but which determine no question bearing on the present case;

Atkinson vs. Southern Express Company, 94 S. C. 44, 78 S. E. 516, held that a law of South Carolina prohibiting the delivery of interstate liquor shipments in that state, which had been held unconstitutional, could derive no force from the Webb-Kenyon Law without re-enactment.

State vs. Cardwell, 166 N. C. 308, 81 S. E. 628 (April 22, 1914), was a conviction on the charge of selling liquors in violation of law. The court referred to the Webb-Kenyon Law but stated that it was not involved in the case, because the evidence did not show an interstate but an intrastate shipment.

There are three other decisions involving the Webb-Kenyon Law which are not in accord with the cases cited.

American Express Co. vs. Beer, 65 So. 575 (Supreme Court of Mississippi, June 22, 1914), holds that the legislature of Mississippi had power under the Webb-Kenyon Law to restrict the amount of liquor which can be delivered to a consignee and to require a statement to be signed by the consignee in connection with such delivery. The court expressly referred to Adams Express Co. vs. Commonwealth, 154 Ky. 462, and Palmer vs. Southern Express Co., 165 S. W. 236, but apparently disagreed with the conclusions reached by the highest courts of Kentucky and Tennessee, preferring to follow State vs. Grier, 88 Atl. 579, in the Court of General Sessions of Kent County, Delaware. American Express Co. vs. Beer was decided by the Supreme Court of Mississippi, June 22, 1914, and the attention of the court was evidently not directed to the fact that State vs. Grier, 88 Atl. 579, had been overruled by the Supreme Court of Delaware in VanWinkle vs. State, 91 Atl. 385, on June 16, 1914.

United States Ex rel Zimmerman vs. Oregon Navigation Co., 210 Fed. 378, was an application for writ of mandamus in the District Court for the District of Oregon to require the defendant railway company to transport whisky from Portland, Oregon, to a consignee in prohibition territory in Idaho for his per-

sonal use. The opinion denying the writ is not a careful consideration of the subject. Judge Bean says:

> "The language of the Idaho statute is manifestly broad enough to make unlawful all intrastate shipments of intoxicating liquors (except certain shipments not material here), although intended for the personal use of the consignee. And in my judgment it should be so treated and considered by a nisi prius court sitting in another jurisdiction until it is otherwise interpreted by the courts of Idaho and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of the statute. Nor am I prepared at this time to say that such a provision is unconstitutional."

The only case relied on by Judge Bean in support of his conclusions was the overruled case of State vs. Grier, which he erroneously supposed to be the decision of a court of last resort.

In State of West Virginia vs. Adams Express Company, 219 Fed. 794, in the circuit court of appeals for the fourth circuit has already been referred to (R. 45). It was held that the state of West Virginia had the power to enact that the place of delivery in West Virginia of an interstate shipment of liquors in fact purchased by the consignee from the shipper in another state, for the personal use of the consignee, was the place of sale of such liquors, and that the act of the legislature of West Virginia in force July 1, 1914, was such an enactment. It was further held that "The Webb-Kenyon Law removes

the protection (of the interstate commerce clause of the Federal Constitution), and subjects the delivery of liquor in West Virginia to the inhibition of the state legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia."

In addition to these cases there is pending in the Supreme Court of Appeals of West Virginia a case involving the same questions, entitled Adams Express Company, Appellant, vs. State of West Virginia, Appellee, No. 2830 on the docket of that court, not yet decided.

We submit that the court below, by its final decree, and the United States Circuit Court of Appeals for the Fourth Circuit, 219 Fed. 794, adopted an erroneous construction of the Webb-Kenyon Law. We contend that that law does not authorize the state to interfere with interstate shipments for personal use, or at any rate the law does not authorize interference with such liquors unless the state, by a law otherwise valid, makes it an offense for a citizen to personally use liquors, or have them in possession for such use. That this limitation in the scope of the Webb-Kenyon Law cannot be removed by the framing of state statutes in different forms; either by forbidding the carrier to transport, or making the place of delivery the place of sale, or other provisions of the kind.

VI.

THE WEBB-KENYON LAW, AS CONSTRUED AND APPLIED BY THE LOWER COURT WOULD BE UNCONSTITUTIONAL.

The construction of the Webb-Kenyon Law, which has been adopted by the highest courts of Kentucky, Delaware, Tennessee and other states, in the cases referred to herein, should be adopted, and that of the court below rejected, in order to save the constitutionality of the law.

As said in Rhodes vs. Iowa, 170 U. S. 412:

> "The right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state."

The power to regulate commerce is the power to prescribe the rule by which the traffic is governed; "Nor" (as said in In re Rahrer, 140 U. S. 155) "can Congress transfer legislative power to a state nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power."

Contracts made by plaintiff in Maryland where it is legal to sell, for the sale of liquors intended for the

personal use of consignees in West Virginia, where it is no offense for such consignees to possess or use them, their transportation and delivery at destination, are all subject matters which belong to interstate commerce and not to the reserved police power of West Virginia. This is true regardless of the fact that the contracts were made as the result of advertisements sent through the United States mails. A law of West Virginia undertaking to regulate and control such interstate commerce is null and void. The subject matter is one which, in its nature and by the constitution, demands that, if regulated at all, it must be regulated by Congress and not by West Virginia upon an attempted surrender by Congress of the constitutional power.

VII.

CONCLUSION.

In Louisville & Nashville R. R. Co. vs. Cook Brewing Co., 223 U. S. 70, the railroad company refused to carry the brewing company's shipments from its place of business in Indiana to consignees in "dry" territory in Kentucky, relying upon the existence of a Kentucky statute prohibiting the transportation and delivery of liquors to points in that state where the sale was prohibited. In the present case the express company does not rely only upon the existence and terms of the West Virginia statute as its excuse for refusing to perform its duties as an interstate carrier, but relies upon the injunction of the Circuit Court of Tucker County, West Virginia (R. 8). That injunction was

issued ex parte, the express company filed no answer, made no motion to dissolve, did not attempt even to comply with the terms of the injunction, but upon its issuance ceased entirely to accept shipments for consignees living within the jurisdiction of the Tucker Circuit Court (R. 33). Any difficulty which might have arisen by reason of the fact that the state of West Virginia, the plaintiff in the suit in the Tucker Circuit Court, was not a party and could not have been made a party against its will in the court below, was avoided by the voluntary intervention of the state in the court below. The original decree of the court below (R. 40) commanded the defendant express company to transport plaintiff's shipments to consignees in West Virginia "for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the state of West Virginia to such customers by the plaintiff in the United States mails." The decree required the express company to use reasonable care to ascertain whether any shipments to be tendered by plaintiff were intended for illegal use, and to refuse such shipments. Upon the foregoing grounds we respectfully submit that that decree was a proper one and should be restored.

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No. 858.

SUPREME COURT OF THE UNITED STATES

October Term 1914

THE JAMES CLARK DISTILLING COMPANY,
Appellant,

vs.

THE AMERICAN EXPRESS COMPANY AND THE STATE OF WEST VIRGINIA.

Appeal from the District Court of the United States for the District of Maryland.

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

The assignments of error, relied upon by appellant, appear at pages 12 and 13 of the brief filed on its behalf.

The first error assigned by counsel for appellant is stated as follows, viz:

> "In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state."

Our answer to such assignment, in condensed form, is stated as follows, viz:

> Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

ARGUMENT ON FIRST ASSIGNMENT.

At the general election held in West Virginia in the year 1912, an amendment to the constitution of said state was ratified by the people thereof in the following words and figures:

> "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

On the 11th day of February, 1913, the legislature of said state enacted chapter 13, Acts of the session of 1913,

the State Prohibition Law, generally known in the state, and hereinafter referred to in this brief, as the Yost law. Said amendment and law became effective on the first day of July, 1914. Sections 1, 2, 3 and 4 of the Yost law, (or so much thereof as seem to be pertinent to the question now under discussion) are now here set forth, as follows:

> "Sec. 1. The word 'liquors' as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquors, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors,' as hereinafter used in this act.
>
> "Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one thousand nine hundred and fourteen, and stored in Unitel States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouse to points outside of this state.
>
> "Sec. 3. Except as hereinafter provided, if any person acting for himself or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars

nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee. * * * * *.

"Sec. 4. The provisions of this act shall not be construed to prevent any one from manufacturing for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal

and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. * * * *

"It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person not a minor, and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage, or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made, and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath. * * * "

The Supreme Court of Appeals of West Virginia has not construed the sections above quoted. The Circuit Court of Braxton County, in the equity cause of State

of West Virginia *vs.* the Adams Express Company, in a written opinion, construed the statute as contended for in our answer to the assignments of error, and perpetually enjoined the express company from carrying liquors, either interstate or intrastate, for delivery to consignees within the jurisdiction of the court, although such liquors were intended for the personal use of the consignees. From the final decree, awarding such perpetual injunction, the express company appealed to the Supreme Court of Appeals of West Virginia, the court of last resort therein, and, while the cause has been argued and submitted to the Court, there has been no decision thereof.

The same question arising here arose in the equity cause of State of West Virginia *vs.* Adams Express Company, instituted in the Circuit Court of Kanawha County, removed by the defendant to the United States District Court, and heard upon appeal by the United States Circuit Court of Appeals for the Fourth Circuit, upon appeal prosecuted by the State. The reported opinion of the Circuit Court of Appeals appears in 219 Fed., 794,—advance sheet No. 4, April 1, 1915.

We cannot better state the proposition, nor can we present stronger argument in support thereof, than to quote from the opinion of the Circuit Court of Appeals at pages 796-799, 219 Fed. Rep.:

> "1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legisla-

tion; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

"We are not concerned in this case with the question whether the state legislature or the state Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state. We think it can be demonstrated that this question must be answered in the affirmative —that it can be made perfectly manifest that shipments into the state and deliveries by common carriers, by which liquor dealers outside of prohibition states were enabled to thwart the efforts of state governments to save the people of the state from the liquor evil, have been forbidden by state legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the act of Congress known as the Webb-Kenyon Act.

"The amendment to the Constitution of the state of West Virginia, known as article 6, sec. 46, ratified in November, 1912, prohibits 'the manufacture and sale and keeping for sale' of intoxicating liquors with exceptions not material here; and it provides that:

'The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.'

"On February 11, 1913, the Legislature enact-

ed a statute to take effect July 1, 1914, which in section three contained this provision:

'Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor * * *; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.' Laws 1913, c. 13 (Code 1913, c. 32a, sec 3 (sec. 1282)).

"2. At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot v. Davenport, 63 U. S. (22 How.) 227, 16 L. Ed. 243, Delamater v. South Dakota, 205 U. S., 93, 27 Sup. Ct., 447, 51 L. Ed., 724, 10 Ann. Cas., 733, and innumerable other federal and state decisions.

'The internal commerce of a state—that is, the commerce that is wholly confined within its limits —is as much under its control as foreign or interstate commerce is under the control of the federal government.' Sands vs. Manistee River

Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113, 31, L. Ed. 149; Hart v. State, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437.'

"This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State v. Herring, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep., 461, and State v. Patterson, 134 N. C. 612, 47 S. E. 808.

"3. There is nothing in the amendment of the state Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors. But it does not indicate a purpose to deprive the Legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the Legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as the permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in State v. Hooker, 22 Okl. 712, 98 Pac. 964.

"4. The point is earnestly pressed that, even if it be true that under the statute in West Virginia delivery in any county of the state is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the state in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person 'who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing or exposing for sale as the case may be', and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the state that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who, either from carelessness or design, habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that habitual aid extended to others violating the law shall not be subject to injunction as a nuisance.

If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in Re Debs, 158 U. S., 564, 15 Sup. Ct. 900, 39 L. Ed., 1092, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration is thus stated in the case cited:

'Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing to one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court.'

"5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor."

In

Atkinson *vs.* Southern Express Co., 94 S. C. 444,

"The state may pass a statute forbidding the importation of intoxicating liquor into this territory for personal use since the passage by Congress of the Webb-Kenyon Act, which prohibits the transportation into any state of any intoxicating liquors, intended to be received, possessed, sold or in any manner used in violation of any law of such state."

To like effect is the reasoning of Chief Justice Clark in the concurring opinion in

State *vs.* Cardwell, 81 S. E., 630.

It may be said for appellant that the Supreme Court of West Virginia held, years ago, that the place of sale of intoxicating liquors was the place where the dealer carried on his business. Such is true. The common law rule formerly applied. *But the legislature changed the common law rule, and it no longer applies.*

It will not be controverted that a state may enact effective legislation declaring the place of delivery to be the place of sale, when applied to intrastate shipments. Why may it not do so now, as to interstate shipments, because of the enactment of the Webb-Kenyon law?

Section 23 of the Yost law is as follows:

> "This entire act shall be deemed an exercise of the police powers of the state for the protection of public health, peace and morals, and all its provisions shall be liberally construed for the attainment of that purpose."

Independently, however, of the statute, liquor laws are enacted by virtue of the police power to protect health, morals and welfare of the public as expressly stated by the Supreme Court of the United States in

Mugler *v.* Kan., 123 U. S., 623;
Crowley *v.* Christensen, 137 U. S., 86;
Eberle v. People, 232 U. S., 700.

In the case of Crowley *v.* Christensen, 137 U. S., 86, the Supreme Court, in the opinion, said:

> "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of a state or of a citizen of the United States. As it is a business attended with dangers to a community it may, as already said, be entirely prohibited, or be permitted un-

> der such conditions as will limit to the utmost the evils."

In Delamater *v.* South Dakota, 205 U. S., 93, it was said:

> "The general power of the states to control and regulate within their borders the business of dealing in or soliciting orders for the purchase of intoxicating liquors is beyond question."

The act of Congress, 26 Stat. 713, c. 728—the Wilson Act—declares that intoxicating liquors—

> "transported in any state * * * shall upon arrival in such state * * * be subject to the operation and effect of the laws of such state * * * enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state * * * ."

In Rhodes *vs.* Iowa, 170 U. S., 412, and in Re Rahrer, 140 U. S., 545, the word "arrival" in the Wilson Act, was construed to mean the actual delivery to the consignee. In the Rahrer case, Mr. Chief Justice Fuller, in the court's opinion, said:

> "No reason is preceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do. * * * Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part."

The Webb-Kenyon act supplements the Wilson Act. Both are in effect. Wherein the Wilson act was weak it is now made strong by the Webb-Kenyon act. The Webb-Kenyon act withdrew the protection of the inter-

state commerce clause from intoxicating liquors, when shipped into a state, in violation of its laws.

It is submitted that intoxicating liquors, under the two acts, are now "subject to the operation and effect of the laws of such state * * * enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state", for the reason that the limitation or impediment existing at the time of the decisions in the Rhodes and Rahrer cases has been removed by the Webb-Kenyon act. The Webb-Kenyon act goes to the very root. By its terms, the *shipment* or *transportation* of intoxicating liquor into a state is prohibited when the intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, in violation of the laws of the state.

Appellant relies on such cases as Adams Express Company *v.* Kentucky, 206 U. S., 129, Vance *v.* Vandercook, 170 U. S., 439, in Re Rahrer 140 U. S., 545, and Rhodes *v.* Iowa, 170 U. S., 412. These decisions were all announced before the enactment of the Webb-Kenyon law. We submit that the language of Mr. Justice White, in the Delamater case, 205 U. S., 93, particularly were the words "and Webb-Kenyon law", made addenda thereto, apropos to the cases so relied upon.

> "For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin, because they concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

Legislature Had in Mind Interstate Shipments.

Appellant contends that the legislature did not have in mind interstate shipments, when the Yost law was en-

acted. We submit this contention is not tenable. The legislature did not presume that the manufacture, sale and shipment of intoxicating liquors, in intrastate business, would seriously menace the health and morals, or disturb the peace of the people, in a state where the manufacture and sale of such liquors were prohibited by the constitution and statutes of the state. Those who engaged in selling such liquors, in such a state, endeavor to avoid intrastate shipments by a common carrier; other and less public means and methods are resorted to by such persons engaged in such business. Again, since intoxicating liquors could neither be manufactured nor kept for sale in a state, the legislature did not presume—could not well presume—that shipments thereof would be *intrastate*. On the other hand the legislative presumption was, necessarily so, that the shipments would come, and must so come, from without the state—*interstate*—and the legislative purpose, therefore, was to protect the people of the state from such interstate shipments, and to give force and effect to the public policy of the state as expressed and reflected in the organic and statutory laws.

Personal Use.

It is contended for appellant that the state legislature did not intend the provisions of section 3 of the Yost law to apply to sales and shipments of intoxicating liquors, when the same were intended for personal use of the consignee. To maintain such contention would require reading into the statute a qualifying clause that is not contained in the statute.

A Moot Question.

Without the slightest concession to appellant's contention that section 3 of the Yost law was not intended

to apply, and does not apply, to interstate shipments of intoxicating liquors for personal use, we submit such contention is now a moot question of construction.

At the regular biennial session of the West Virginia legislature, session 1915, section 7 of the original Yost law was amended. The original section read as follows:

> "The keeping or giving away of intoxicating liquors, or any shifts or devices whatever, to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act."

By act of the session of 1915, passed the 29th day of January, 1915, approved February 5, 1915, and in effect thirty days from passage, and now chapter 7, Acts 1915 of the West Virginia legislature, the original section 7 was amended so as to read as follows:

> "It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four) fruit stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however,* that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but

> the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further,* that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and *provided, further, however,* that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes."

No section, other than section 7, of the original act was amended or repealed. Among other provisions of the amended section 7 is this:

> "And, *provided, further,* that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections 4 and 24."

It is not the theory of plaintiff's bill, prayer or evidence, that Rozier is a druggist; indeed, the whole theory of the bill and prayer is, that the defendant carrier be required to accept from plaintiff and carry and deliver into West Virginia *all* intoxicating liquors tendered to it for carriage when for the personal use of the consignees. We submit the Court will not grant relief to the plaintiff in error, in any event, if the Court finds it cannot grant effectual relief.

In Mills *v.* Green, 159 U. S., 651, at page 653, the Court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

To like effect is

Campbell *v.* California, 200 U. S., 87.

The cases of The State of Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 Howard, 421, and United States *v.* Schooner Peggy, 1 Cranch, 37, we submit, are strikingly in point.

The Main Proposition on First Assignment.

This leaves, we submit, the main and one great proposition arising on the first assignment, —

> Has the state legislature the power to enact such legislation as section 3 and amended section 7 restricting shipment and transportation of intoxicating liquors into the state?

We most respectfully submit it has, unless the Webb-Kenyon law is unconstitutional.

Webb-Kenyon Law is Constitutional.

We submit the Webb-Kenyon law does not delegate to the states any power that Congress has over interstate

commerce; nor does it confer upon the states the power to regulate interstate commerce. Congress did, however, in its enactment, simply withdraw from intoxicating liquors the protection of the interstate commerce clause of the Federal constitution, when such liquors are shipped into a state in violation of its laws.

The report of the House Committee on the Judiciary, respecting the Webb-Kenyon bill, submitted by Mr. Webb, chairman of the Committee, among other things stated:

> "The bill is intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Teritory. Few words will suffice to justify the policy of such a bill. Before the Wilson Act of 1890, any person had the right, not only to have intoxicating liquors transported to him from without the State, but also to sell such liquors in the original package. The decision of the court in Leisy *v.* Hardin (135 U. S., 100) held that the consignee of such liquor had the right to sell it in the original package under the interstate-commerce clause of the constitution. The Supreme Court held in the case of Rhodes *v.* Iowa that the Wilson law deprived the consignee of such liquor of the right to sell it in the original package, or otherwise, in violation of the law of the State. * * * *
>
> "Congress has the power to enact this bill into law. The regulation of commerce with foreign nations, among the several States, and with Indian tribes is completely reposed in the Congress of the United States by article 1, section 8, clause 3 of the Constitution. The power to regulate includes the power to prohibit, as is shown by a long line of decisions of the Supreme Court and by a long line of Federal laws which have never been attacked." Report No. 1461, 62d Congress, 3d session, Feb. 7, 1913.

There were divergent views expressed during debates

on the bill. The Court can look to these debates, when interpreting and construing the law, if the law upon its face is ambiguous.

The Wilson act has been held to be constitutional and has been applied in such cases as in Re Rahrer, 140 U. S., 545, and Delamater *v.* Dakota, 205 U. S., 93. The Webb-Kenyon law is the same in principle as the Wilson act, but goes further and is more drastic.

The proposition is so briefly, and yet so clearly, stated by the United States Circuit Court of Appeals in State of West Virginia v. Adams Express Co., 219 Fed., page 802 of the opinion, that we now here quote the same.

> "The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state legislatures the power to regulate interstate commerce. This, we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex parte* Rahrer, *supra*: Lottery Case, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke *v.* United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; Hipolite Egg. Co. *v.* United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not impart the power to exclude sound wheat.
>
> "The following language of Mr. Justice White in Vance *v.* Vandercook, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or trans-

portation of liquor intended for personal use from a license state to a prohibition state.

'On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States.'

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

"As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by comon carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is

founded on deep reason and enlightened public policy."

CARRIER WOULD BE PUBLIC NUISANCE.

Sections 14 and 17 of the Yost law are as follows:

"Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever, as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

"Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but

on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual.

"Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendant therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein."

It is submitted that any common carrier, such as appellant, would constitute itself a public nuisance, subject to injunction and abatement, if it carries, indiscriminately, intoxicating liquors into the state. State *v.* U. S. Express Co., (Ia.) 145 N. W., 451; Southern Express Co. *v.* State (Ala.), 66 So., 115. The proposition is so well stated in the opinion of the Circuit Court of Appeals in State of West Virginia *v.* Adams Express Co., 219 Fed., at page 798, in paragraph 4, already hereinbefore quoted, that we refer to the paragraph and adopt it as part of this brief.

WEBB-KENYON LAW AND YOST LAW ARE NOT IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Appellant centends

> "that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment."

The states are possessed of their reserve police power. This power they did not surrender to the federal government. It must be conceded that the state is possessed of the power to forbid sales of intoxicating liquors within its own borders, even when intended by the buyer for personal use. WOULD IT BE SUGGESTED THAT ONE CAN SELL TO ANOTHER INTOXICATING LIQUORS WITHIN THE BORDERS OF THE STATE, EVEN FOR PERSONAL USE, WHEN THE LAW OF THE STATE FORBIDS THE SALE OF SUCH LIQUORS? IF THE STATE CAN DENY THE OUTSIDE DEALER THE RIGHT TO SOLICIT ORDERS FROM ITS CITIZENS, UNDER THE WILSON LAW, WHEN THE CITIZENS DESIRE THE INTOXICATING LIQUORS FOR PERSONAL USE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, *(Delamater v. S. Dakota, 205 U. S., 93; State* v. *Miller, 66 W. Va., 436)* WHY CANNOT THE STATE, SINCE THE ENACTMENT OF THE WEBB-KENYON LAW, DENY THE RIGHT OF SHIPMENT OR TRANSPOR-

TATION OF SUCH LIQUORS INTO THE STATE FOR SUCH PERSONAL USE? IF THE STATE CAN DENY ITS CITIZENS THE RIGHT TO PURCHASE INTOXICATING LIQUORS FROM ONE ANOTHER, FOR PERSONAL USE, WITHIN THE STATE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, WHY CAN IT NOT NOW DENY ITS CITIZENS THE RIGHT OF SHIPMENT TO THEM, BY A CARRIER, OF SUCH LIQUORS FOR SUCH USE? WE SUBMIT THE STATE CAN DO SO FOR THE APPARENT REASON THAT CONGRESS HAS DIVESTED INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER, WHEN THE "SHIPMENT" OR "TRANSPORTATION" THEREOF INTO A STATE, IS IN VIOLATION OF THE LAWS OF THE STATE.

County local option laws have been repeatedly upheld. Provisions in such laws forbidding shipments into counties for personal use have been repeatedly upheld, when the shipments were intrastate. Indeed we do not recall any decision to the contrary. The effect of such local option laws, depriving, or tending to deprive, a citizen of intoxicating liquors for his personal use, has never led the courts to declare such laws a deprivation of the constitutional rights, state or federal, of the citizen. Since the enactment of the Webb-Kenyon law, we submit, the same principle is now applicable to *interstate* shipments, that is applicable to *intrastate* shipments under state local option laws.

In the majority report from the House Committee of the Judiciary, respecting the Webb-Kenyon Act, report No. 1461, 62d Congress, 3d session, Feb. 7, 1913, hereinbefore referred to, this language is used:

> "This bill might well be styled a local option act to give the various states the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate commerce law from the action of the states and discontinue the handicap under which they now labor, in enforcing their police regulations, and

> leave them freer to break up the blind tigers and bootleggers that infest many dry states."

Therefore, in conclusion of the first assignment of error, it is most respectfully submitted that the court below did not err.

SECOND ASSIGNMENT OF ERROR.

The second error assigned by counsel for appellant is stated as follows:

> "In construing the constitution and law of West Virginia as prohibiting a liquor dealer in another state from advertising by letters, mailed to citizens of West Virginia, the sale of liquors in such other state, to be delivered in pursuance of such sales to consignees in West Virginia."

In the petition of the state of West Virginia it is charged that the appellants, on and since the first day of July, 1914, has, by printed or written circular letters, order blanks and price lists, solicited citizens of said state, particularly citizens residing in the Sixteenth Judicial Circuit thereof, to give orders to appellant, the James Clark Distilling Company, for intoxicating liquors. That the purpose of such letters, circulars, order blanks, etc., was to procure from the citizens of said state, particularly those residing in said Sixteenth Judicial Circuit, orders for intoxicating liquors to be filled by the appellant, and that the appellant intended to accept such orders and ship such intoxicating liquors to such citizens aforesaid by the defendant, the American Express Company. R. pp. 12-13.

It is established by the admission of John Keating, president and treasurer of appellant, a witness introduced by the appellant, that the appellant, on and since the first of July, 1914, sent circulars and order blanks into West Virginia, soliciting from the citizens thereof

orders for intoxicating liquors kept for sale by the appellant. R. pp. 29-31.

Our first answer to appellant's second assignment of error is this:

> The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden, so is any constituent or accessory part thereof forbidden.

Section 3 of the Yost Act, hereinbefore quoted to a large extent, expressly provides:

> "Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for any liquors or absinthe, or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be confined," etc. First offense, a misdemeanor; second offense, a felony.

However, it may be said by the appellant that under the Interstate Commerce clause of the Federal Constitution, the provisions of the Yost act relative to soliciting orders cannot be applied to the non-resident dealer, that he is not affected by the laws of West Virginia, so far as intoxicating liquor situated in another state may be concerned, when he intends to fill the order he receives, in response to his solicitation, from his place of business in another state. This has always been the contention of the liquor dealers outside of a state, and, frankly, that contention is supported by a long line of authorities, but that line of authorities is broken. The effect of that line has been modified by the Wilson Act and the Webb-Ken-

yon Act. Our answer is fuly sustained by Delamater *v.* South Dakota, 205 U. S., 93.

Our second answer to appellant's second assignment of error is this:

While there is no Federal law that forbids the use of the mails to a non-resident liquor dealer to solicit orders for intoxicating liquors or advertise the same by circular, order blank and price list, it is, however, most respectfully submitted that,

> *the soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.*

True, appellant used the mails to send letters, price lists and order blanks to citizens of West Virginia. It was not contended in the court below, and it is not contended here, that such use of the mails violated the laws of West Virginia. The legislature of West Virginia could not declare such use of the mails to be unlawful. Congress alone can say what shall not be mailable.

Let us suppose appellant delivered in person the soliciting letters. Will any one say it had not solicited in violation of the state's law? What distinction is there between personally delivering the letters and sending them by a *servant*—the postoffice—of the writer? In U. S. *vs.* Thayer, 209 U. S. 39, the Court said:

> "If the writer of the letter in person had handed it to the man addressed, in the building, without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer."

In Zinn *v.* State, (Ark.) 114, S. W., 227, it was held that a statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents, circulars or newspaper advertisements is a valid

exercise of the state's police power, and it was expressly held in such case that

> "A statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through circulars, is not unconstitutional as infringing the power of Congress, under U. S. Const., Art. 1, Sec. 8, to establish postoffices and designate what shall be excluded from the mails."

In Hayner *v.* State, 83 Ohio St. Rep. 178, it was expressly held that a solicitation for intoxicating liquors may be made by letter as well as in person. Hayner was indicted and convicted for soliciting orders for intoxicating liquors. It was shown that he solicited the order by letter sent through the United States mails. The conviction was upheld by the court of last resort of Ohio, the Court holding that the Hayner letter, while mailable, so far as the laws governing the mails were concerned, was a solicitation

same as though he had solicited in person,

and that a statute, making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through agents, circulars, posters, letters, etc., is not unconstitutional as infringing the powers of Congress relating to what shall be excluded from the mails.

In Rose *v.* State, (Ga.) 62 S. E., 117, the Intermediate Court furnishes a very able discussion of the proposition here involved. True, the Georgia Supreme Court, 133 Ga. 353, 65 S. E., 770, 36 L. R. A. (N. S.) 443, reversed the Intermediate Appeal Court. The opinion of the Georgia Supreme Court was handed down October 1, 1909, before enactment of the Webb-Kenyon Act. The reasoning of the Georgia Supreme Court, for the reversal, in substance, was, that the Tennessee dealer, under the Interstate Commerce clause, engaged in selling intoxicating liquors, was handling an article that was legitimate interstate commerce, not subject to any restriction by the state. The Court, in the opinion, said:

> "To hold that a person had a right to make an interstate sale, but that the state to which the liquor was to be sent could prohibit him from using the interstate mails for the purpose, would certainly greatly curtail the right to do such business."

It is apparent from the opinion of the Georgia Supreme Court that it reversed the Intermediate Appellate Court upon the ground that intoxicating liquors were unqualifiedly legitimate interstate commerce. Since the enactment of the Webb-Kenyon Act such is no longer true. Now, intoxicating liquors are divested of their interstate character when the shipment or transportation thereof into a state, to be there received, possessed, sold or in any manner used by any person interested therein, is in violation of the law of the state.

A very clear and, we submit, determinative ruling of the Supreme Court of the United States, is found in

U. S. *v.* Thayer, *supra.*

Thayer, by letter, solicited funds for campaign purposes in violation of the Civil Service Act. The Court held that the solicitation was not complete until the letter was delivered to the person from whom the contribution was solicited. Such, in principle, is the proposition we are making here. It was no offense for plaintiff to deposit its letters in the mails. It was no solicitation of the citizens of West Virginia to buy liquors from appellant until its letters were delivered to the persons from whom the orders were solicited. The postoffice then had nothing more to do with the letters. The postoffice was a mere, innocent, inanimate agency that carried the soliciting letters. So long as the letters remained in the custody of the postal authorities, there were no solicitations—no offenses committed by appellant. The offense arose after the letters were delivered by the postal authorities and in the hands of the persons solicited to

give orders or in the hands of such persons as advertisements of appellant's business.

Mr. Justice Holmes, speaking for the Court, in the Thayer case, pages 42-3, said:

> "Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. * * * If the writer of the letter in person had handed it to the man addressed, in the building without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer.
>
> "The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation."

Of like holding is the case of

In Re Palliser, 136 U. S., 257.

It is no answer to say that in the Thayer case it was an offense anywhere in the United States for one to solicit campaign contributions in a public building, for the reason, that, as stated by the Supreme Court in both of the cases just cited, *that one may solicit by letter as well as in person,* and particularly because the Court says that if the letter had never reached the person to whom addressed, there was no solicitation, the Court saying:

> "If the letter had miscarried or been burned, the defendant would not have accomplished the solicitation."

Let us further illustrate the proposition. The addressee received from appellant, through the United States mails, a letter soliciting an order for intoxicating liquors. He received such letter in West Virginia. The postal authorities, after delivery, no longer had control of the letter. The addressee could do as he pleased with it. Suppose he had destroyed it without reading or otherwise learning its contents. *No solicitation, no offense.* But he did *not* destroy the letter. He learned its contents—he had been solicited in West Virginia—an offense was committed in West Virginia, *after delivery of the letter by the postoffice.*

It may be said, however, that such holding would interfere with the use of the mails. Not at all. Had appellant's personal representative come into the state in person and solicited, and been apprehended, could it be said that he had committed no offense, because to so hold would be interfering with interstate commerce?

We submit the principle contended for here is further supported by the case of

State *v.* Morrow, (S. C.) 18 S. E., 853.

Morrow sent by mail from Washington, D. C., to a woman in South Carolina certain pills to be used for certain purposes. He suggested, by letter the use of the pills to cause abortion. To suggest abortion, or aid the same, was an offense by the statute of South Carolina. The pills were received, the advice of Morrow acted upon, resulting, in connection with other things, in the death of the woman. Morrow was indicted and convicted in South Carolina for a statutory offense. The offense was not committed by mailing the pills. For some purposes they might have been lawful. The Supreme Court of South Carolina, in the opinion, said:

> "Upon the same principle, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered

to Colie Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills, to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency of the mail to do the act which he desired to have done, and which was done by his express authority and direction in this state."

The Court held that it was immaterial that the offense charged was a statutory offense independently of common law offense.

The Circuit Court of Appeals, in the State of West Virginia *v.* Adams Express Co., 219 Fed., at pages 799 and 800, said:

"6. The right of the state to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another state, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

"7. It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like

> use of the mails to promote a criminal conspiracy, or to perpetuate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; United States *v.* Thayer, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; Hayner *v.* State, 83 Ohio St. 178, 93 N. E. 900; State *v.* Morrow, 40 S. C. 221, 18 S. E. 853."

We submit, therefore, that such soliciting is an unlawful act on the part of the outside dealer or seller, who is a party interested in such transaction, and therefore prohibited by the state law, the Wilson Act and the Webb-Kenyon Act, and vitiates any sale and shipment made upon such solicitation, for the reason that such solicitation is a part of the sale,—an unlawful element in the sale.

CONCLUSION.

We most respectfully submit that there is no error in the decree complained of.

FRED. O. BLUE,
Counsel for the State of West Virginia, Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 383

THE JAMES CLARK DISTILLING COMPANY,
APPELLANT,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY AND THE STATE OF WEST VIRGINIA,
APPELLEES.

No. 384

THE JAMES CLARK DISTILLING COMPANY,
APPELLANT,

vs.

THE AMERICAN EXPRESS COMPANY AND THE STATE OF WEST VIRGINIA,
APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

W. B. WHEELER,
Of Counsel for the State of West Virginia.

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THE JAMES CLARK DISTILLING CO.,
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vs.

THE AMERICAN EXPRESS CO. AND THE STATE OF WEST VIRGINIA
Appellees.

Brief for the State of West Virginia.

STATEMENT OF THE CASE

These cases were heard in the October term, 1914, along with the case of the Adams Express Co. v. The Commonwealth of Kentucky. They were re-docketed for hearing without any motion for re-hearing having been filed. The court did not indicate any particular point on which the cases were to be re-argued. They will be briefed therefore as for an original hearing.

The construction of the West Virginia law and the state prohibition amendment of West Virginia have been fully discussed in a very able brief by Honorable Fred O. Blue, State tax and prohibition commissioner of West Virginia. In the brief which we submit

* Blackface and capitals in this brief supplied.

herewith we confine ourselves to two propositions which are involved in this case.

First, Is the Webb-Kenyon law constitutional?

Second, Has the State of West Virginia the authority to enact the legislation involved, to-wit:

To prohibit the **possession and receipt** of intoxicating liquor for beverage purposes, from a common carrier.

CONSTITUTIONALITY OF WEBB-KENYON LAW

I

POWER OF CONGRESS TO ENACT LAWS REGULATING INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Article 1. Section 8, clauses 3 and 18, set forth the power of Congress to enact laws regulating interstate commerce. They read as follows:

> "To regulate commerce with foreign nations, among the several States, and with the Indian tribes."
> "To make all laws which shall be necessary and proper for carrying into execution the power given."

THE WEBB-KENYON LAW IS AUTHORIZED BY THE FEDERAL CONSTITUTION.

The Webb-Kenyon law has been sustained by five courts of last resort since the last hearing on these cases. The validity of the law or its application to the facts have been considered in many courts. In three instances the courts did not pass directly upon the constitutionality of the law. The Court of Appeals in Kentucky, 154 Kentucky 462, held that the facts did not constitute a violation of a valid state law. The Supreme Courts of Tennessee and Delaware reached a similar conclusion in the cases before them, namely, that the shipments were for a lawful purpose and therefore did not come under the provisions of the Webb-Kenyon law. In no case has a Court of last resort held that the Webb-Kenyon law was unconstitutional. On the other hand this law has been declared con-

stitutional and valid by every State Supreme Court, the United States Circuit Court of Appeals and all of the upper courts in the State and Federal government which have passed upon its constitutionality.

Glen vs. Southern Exp. Co. N. C., decided Dec. 1, 1915.

Southern Express Co. v. State, 66 So. Rep. 115.

Southern Express Co. v. Whittle (Ala.) 6950 South Rep. 652.

West Va. v. Adams Ex. Co. (C. C. A.) 219 Fed. 794.

State v. S. A. L. R'way (N. C.) 84 S. 283.

State v. Doe (Kansas) 139 Pac. 1169.

Kans. vs. Mo. Pac. Ry.

State v. Express Co. (La.) 145, 451.

Sou. Express Co. v. Beer (Miss.) 65 South 575.

United States v. Oregon & W. R. & N. Co. 210 Fed. 378.

Atkinson v. Sou. Ex. Co. 945 C. 444, 78 S. E. 516 45 L. R. A. (N. S.) 349.

Van Winkle v. Delaware, 91 Atl. 385.

Gottstem v. Washington, decided December 12, 1912.

Tailor vs. Commonwealth, 85 S. E. Rep. 499.

The court of last resort in Kentucky on November 4, 1915, in the last case before it, Adams Express Company v. Com. (Ky), 169 S. W. 603, held:

> "The Webb-Kenyon Act puts beyond the protection afforded interstate commerce any intoxicating liquor shipped into the state to be sold or in any manner used, in violation of the laws of the state."

The court cited most of the above cases as authority for their decision.

This court in the recent case of Adams Express Company v. Kentucky, October term, 1914, said:

> "The Constitution of the United States grants to Congress authority to regulate commerce among the States to the exclusion of State control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the

> Constitution itself. * * * Before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there is nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the State by means of interstate commerce."

This Court has repeatedly held in an unbroken line of decisions from Gibbons v. Ogden, 9 Wheaton, page 1, down to the last case before this Court, involving this question that there is no limitation on Congress in regulating interstate commerce except what is found in the Constitution itself. There is no provision in the Constitution which prohibits Congress from enacting a measure like the Webb-Kenyon law.

2

THE LAW IN QUESTION IS NOT A DELEGATION OF LEGISLATIVE POWER

It is the theory of those who oppose this law, that Congress has delegated some power to the State to regulate interstate commerce. Under the plenary power of Congress to regulate interstate commerce, this law provides that the protection of interstate commerce shall be denied to intoxicating liquors which are shipped from one State to another when such liquors are to be received, or possessed, or used in violation of the State law. This is not a delegation of power, it is an absolute exercise of the power of Congress. It does not prohibit all liquors from the channels of interstate commerce, but simply those which are transported, received, possessed or used in violation of the laws of the State. If it be conceded that all

liquors may be denied the privilege of interstate commerce, then it follows that the shipment of these which are in violation of the law, may be denied the privilege of interstate commerce.

An illuminating discussion on this point is found in the decision of the Supreme Court of Iowa, State vs. U. S. Express Company, 145 N. W. Rep. 551:

> "There are no words of delegation in the act itself, and the theory of it is that liquors intended for use, contrary to State rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the State is interfering with interstate commerce, for the reason that right of such shipments between the States is denied by Federal legislation. It is true that the effect of the act is to give the States more power, but there is no such express delegation and the language of the act is in no sense permissive. The act is prohibitory in character and acts not upon States but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation.
>
> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confined to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it has already had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.
>
> "Congress may say the power to engage in interstate or international commerce shall not be understood as permitting anybody to sell opium or intoxicating liquors to anyone else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to

> say * * * That is not a question of delegated power. It is not a question of permission to the State. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce."

See also cases cited supra.

Congress does not delegate power to the states to regulate interstate commerce, but Congress itself prohibits the facilities of interstate commerce to all liquors outlawed in the states under the police power. It was decided in Hill vs. Hesterberg, 184 N. Y. 126 at 132:

> "That Congress can authorize an exercise of police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in Re Rahrer 140 U. S. 545."

Congress released its control over liquor shipped by interstate commerce under the Wilson Law upon arrival. This gave the States some relief in the enforcement of their laws. The Webb-Kenyon Act goes one step further and prohibits all shipments of liquor into a State for a purpose prohibited by State law. In neither case is there a delegation of power, but there is a proper use of power concurrently by the State and Federal governments within their respective jurisdictions in dealing with a recognized evil.

CONGRESS HAS POWER TO ELIMINATE DELETERIOUS COMMODITIES FROM INTERSTATE COMMERCE

It is a mooted question how far Congress may go in regulating or removing useful commodities from the channels of interstate commerce, but there is ample authority for the proposition that any article of commerce which is detrimental to public morals may be eliminated from commerce entirely.

The Supreme Court recognized this principle of legislation when it upheld the action of Congress forbidding the

interstate traffic in lottery tickets in the following language, 188 U. S. 356:

> "We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode of regulation of that particular kind of commerce? * * * In determining whether regulations may not under some circumstances properly take the form of or have the effect of prohibition, the nature of the interstate traffic which it has sought to suppress cannot be overlooked.* * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals. * * * In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lottery tickets, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.
>
> "If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another,

we know no authority in the Courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the nation. It is a kind of traffic which no one can have the right to engage in."

COMMERCE WITH INDIAN TRIBES.

In United States vs. 43 Gallons of Whisky, 93 U. S. 188, the Supreme Court states:

> "Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the 'Indian country,' but may extend such Prohibition to territory in proximity to that occupied by Indians."

In Buttfield's case, 192 U. S. 470, it is held Congress has plenary power to prohibit the importation of goods from foreign countries. To the same effect is the Gibbons case in the Northern Securities Litigation, 193 U. S. 334, where the court said:

> "By the expressed words of the Constitution, Congress has power to regulate commerce with foreign nations and among the several States and with the Indian tribes. In view of the numerous decisions of this court there ought not at this day to be any doubt as to the general scope of this power. Under some circumstances regulation may properly take the form and have the effect of prohibition."

TRANSPORTATION OF ANIMALS.

By the Animal Husbandry, 23. Stat. 31 Ch. 60, of May, 1884, Congress prohibited the transportation of live stock between the States which had or might have infectious and contagious diseases.

Reid v. Colorado, 189 U. S. 137, sustains the constitutionality of this act of Congress, and also sustains the con-

stitutionality of a Colorado State statute, supplementing the constitutional act and providing far more stringent provisions. In fact, in this particular case the shipper had complied with the provisions of the congressional act. Justice Harlan said:

> "Now it is said the defendant has a right under the Constitution of the United States to ship live stock from one State into another. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a State against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals."

TRANSPORTATION OF FOOD AND DRUGS.

By the Pure Food and Drugs Act of 1906, Congress prohibited the shipment into any State of certain adulterated or misbranded foods and drugs.

In Hippolite Egg Co. v. United States, 220 U. S. 45, the Supreme Court of the United States sustained the constitutionality of this act.

COMMERCE IN OUTLAWED LIQUORS.

The Supreme Court of Kansas in the recent case of State vs. Missouri Pacific Railway Company, No. 19984, decided this proposition in a very well considered and exhaustive opinion as follows:

> "Next, as to the power of Congress to class intoxicating liquor as a commodity fraught with danger of damage and therefore to be excluded from interstate commerce, it is said that unlike statutes relating to the lottery tickets, diseased meats and other articles which have been denied the privilege of interstate commerce, this act denies such privileges to intoxicating liquors only in certain local territory dependent entirely upon State legislation, thus leaving it recognized as a legitimate article of interstate commerce when shipped under certain conditions and circumstances and entirely illegitimate under other circumstances and conditions." * * *

"The title is—'An Act divesting intoxicating liquors of their interstate character in certain cases.' * * * Congress has, therefore, undertaken to divest of its interstate character all intoxicating liquor shipped into a State to be used for an unlawful purpose—that is, for a purpose made unlawful by any law of such State. **When the law of a given State makes it a crime to sell intoxicating liquor, Congress intends that any liquor shipped in for the purpose of violating such statute shall be divested of its interstate character and that all the protection incident to such character shall be removed from it.**

"This brings us to the vital question on which will hang all the law of the prophets of this conviction, namely; whether the power granted to Congress by the Constitution to regulate interstate commerce includes the authority thus to divest a given commodity of its interstate character.

"In considering this most important and far-reaching problem it is one thing to regard its solution as a logical deduction to be drawn mechanically from the language of the Constitution and another thing to account this a serious, deliberate attempt by the law-making power of the nation to obey the very spirit of the Constitution itself framed for the professed purpose of insuring domestic tranquility and promoting the general welfare. The citizen, who driving close to the brink, passes the danger line and finds himself in the wrecked condition brought about by transgressing the law, will search with eagerness for some solace and protection in the great fundamental charter whence the body which enacted the law derived its power. Under these circumstances the searcher asserts with vehemence the rights of the individual as against the assumed corrective power of the State itself, and the immortal blessings of personal liberty find no greater champions or more eloquent eulogists than those who are accused of violating statutes prescribed for the government of their conduct. It may be said, however, that constitutions are not framed and adopted for the special benefit of those who disregard or stretch to the breaking enactments intended for the enhancement of the public peace and welfare, but for the good of the citizenship at large, and the protection of higher

things of real value to humanity which make life worth living. **Civil conditions cannot remain stationary and unless they retrograde they must advance,** and when the law-making power of the nation upon serious thought and careful deliberation, enacts a statute manifestly and unmistakably intended to promote the public health and morals and happiness it must be presumed, until the contrary is clearly shown, that it acted within its lawful province and power. Let us see, then, whether liquors shipped into a state for the purpose of violating its statutes can be divested of their interstate character in the exercise of Congress of its power to regulate interstate commerce. * * *

"In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to those new conditions.

"As said by a brilliant and well-known member of the legal profession:

"'* * * The Constitution our fathers made had the marching quality in it; * * *.'

"It has been supposed by some students of our national history that a written constitution is an inert mass of tabulated provisions. The supposition is not correct; **for the national Constitution, under the guidance of our great court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of 'progressing history.' This does not mean that a written Constitution grows by being violated whenever its provisions stand in the way of national progress; but it does mean that our Constitution was, by the enlightened foresight of its framers, made to be an intelligent guide and chart, not a mere list of obstacles.** (George R. Peck, Reports of American Bar Association, 1900, Vol. 23, pages 256 and 275.)

"We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one Federal and national Constitution—a Constitution that would produce the advantages of good, and prevent the inconvenience of bad government—a Constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every party, a Constitution that would insure peace, freedom and happiness, to the States and people of America." (Lectures of James Wilson, Vol. 1, p. 542.) "Although Congress cannot authorize a State to legislate, it may adopt State legislation; it may divest designated articles of their interstate commerce character and subject them to the operation of State laws * * *." (Sutherland's Notes on United States Constitution, p. 79.)

"That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in Champion v. Ames." (188 U. S. 321.) (Willoughby on the Constitution, Vol. 2, Sec. 347.)

"A writer of great legal experience and ability, in speaking of the power of Congress to regulate commerce, said: 'Having ascertained, then, what commerce is, and what are some of its elements, which may be the subject of the action of Congress, or of the attempted action of the States, we next come to consider what it is to regulate commerce. * * * Commerce being intercourse and traffic between people, to regulate it is to prescribe rules by which it shall be conducted.' (Miller on the Constitution, p. 449.)

"In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, Mr. Justice Field in delivering the unanimous opinion of the court, said (p. 203):

" 'Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations vested in Congress is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it

shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.' At page 215, the court quotes with approval from Judge Cooley, (Cooley's Constitutional Limitations, 732), to the effect that **Congress may descend to the most minute directions of interstate commerce and may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution.**

"In United States v. Gettysburg Electric Ry. Co. 160 U. S. 668, the act of August 1, 1888.

"'An act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid.' (p. 429.)

"Again:

"'Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of the battle, in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. * * * No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and any inference from them all may be drawn that the power claimed has been conferred.' (p. 430.) * * * **'For it is of as much national importance to make men sober as to make them patriotic.'** In the case of In Re Rahrer, 140 U. S. 545, holding constitutional the Wilson bill which removed from interstate shipments

is it logically inconsistent with plenary power to regulate the traffic in such commodity between the States, because it is now the settled doctrine of the Federal courts that interstate commerce is a subject on which primarily Congress alone may legislate and of which it alone has jurisdiction and concerning which the State may not assume to act except incidentally whether Congress sees fit to act or not. The inevitable corollary of this doctrine is that Congress possesses over this subject power so ample and so complete that it may well remove from a commodity otherwise legitimate its interstate character and protection whenever its movement in interstate commerce is for the accomplishment of an unlawful purpose—the violation of the laws of one of the sister States of the Union. Those who contend for the invalidity of the act must base their reasoning on the slender platform that intoxicating liquor when transported for the purpose of violating a State statute is by some subtle constitutional alchemy of the same national importance and entitled to the same governmental protection as if it were brought into the State for the most beneficent purpose imaginable. We deem this line of argument and the conclusion resulting therefrom opposed to the true doctrine of constitutional interpretation and to the spirit expressed by the framers of the Constitution when the preamble was formulated."

ALCOHOL OR INTOXICATING LIQUOR USED AS A BEVERAGE IS A DELETERIOUS COMMODITY AND MAY BE EXCLUDED FROM INTERSTATE COMMERCE.

Science has demonstrated and governments of the world have officially recognized these facts about intoxicating liquor.

Alcohol, or intoxicating liquor, is a poison to all life, plant and animal.

At the International Congress on Alcoholism in London in 1909 where many well-recognized and well-known scientific men and medical leaders from all the great nations were in attendance, the following statement defining the

nature of alcohol was drafted and signed by large numbers of these leaders:

> "Exact laboratory, clinical and pathological research has demonstrated that alcohol is a dehydrating protoplasmic poison, and its use as a beverage is destructive and degenerating to the human organism. Its effect upon the cells and tissues of the body are depressive, narcotic and anaesthetic. Therefore, therapeutically its use should be limited and restricted in the same way as the use of other poisonous drugs."

The committee of fifty-one which determines what drugs and narcotics shall be recognized as medicine in the United States Pharmacopoeia have decided, beginning with January, 1916, whisky and brandy shall no longer officially be recognized as a medicine in the United States Pharmacopoeia. These cold-blooded scientists have reached the conclusion that even as a stimulant for medical purposes, it is a failure. The after-effects are so deleterious that other stimulants which are not followed by these evil results should be substituted.

Alcohol penetrates the nerve fibers like chloroform and is a deceptive, habit-forming drug, injuring the drinker and those dependent upon him for support.

This court said in the case of Crowley v. Christensen, 137 U. S. 86:

> "There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the abasement which it creates, but as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

See Mugler v. Kansas, 123 U. S. 623:

> "But surely it will not be said to be a part of anyone's liberty, as recognized by the Supreme Court

> times as much in free drinkers and three to fifteen times as much in excessive drinkers compared with abstainers."

Insurance companies give us indisputable facts that the use of liquor shortens the drinker's life. Arthur Hunter, Chairman of the Central Bureau Medico-Actuarial Mortality Investigation, December, 1914, reported statistics gathered from two million lives. It showed that among the men, whose habits were considered satisfactory, but were drinkers of alcoholic liquors, the death rate was fifteen to a thousand, where the death rate would only have been ten had alcoholic liquors not been used. He also stated that the data gathered from these two million lives showed men whose average age was 35, would as total abstainers have an expectancy of life for 32 years more, but the liquor habit had caused a deduction of more than four years.

In State v. Kansas, 80 Pacific, at page 989, the court says:

> "The commodity in controversy is intoxicating liquors. * * * but the article is one whose moderate use, even, is taken into account by actuaries of the insurance companies, and which bars employment in classes of service involving prudent and careful conduct, an article conceded to be fraught with such contagious peril to society that it occupies a different status before the Courts and the Legislature from other kinds of business."

The Mortality Statistics published by the Census Bureau of this Government clearly demonstrate the deleterious character of the commodity in question and the necessity for Federal legislation, which will safeguard and protect our people from the evil effects arising from the use of intoxicating liquors.

It is a fact within the common knowledge of all that the male population is more addicted to the use of intoxicating liquors than the female population. The result of this use of intoxicating liquors of the male population in excess of the use thereof by females is written by the hand of death in our Mortality Statistics.

While the male and female population are practically the same, the number of deaths of the two divisions are widely different, and this difference is becoming greater and greater as the years go by.

In order that the Court may fully understand the serious consequences resulting from the use of intoxicating liquors by our people, we attach a table taken from the Mortality Statistics, published by the Census Bureau for the years 1906, 1908, 1910, 1912 and 1913, being the last year for which we could obtain these figures showing the number of deaths of males and females, and total number of deaths within the registration area of the United States for the respective years. This area has been considerably increased during this period of time. It will therefore be necessary to take the per cent of increase in order to make a proper comparison.

We have selected nine of the causes of death in which the use of intoxicating liquors, according to the most modern medical testimony, contributes most largely, to-wit:

Alcoholism, homicide, suicide, paralysis of insane, cirrhosis of liver, venereal diseases, angina pectoris, ulcer of the stomach and epilepsy.

We have given these in the order in which they are affected by the use of intoxicating liquors, beginning with alcoholism, the most potent cause of those named.

We herewith attach table No. 2, giving the number of deaths in the registration area for the years 1906 and 1913, for these nine causes, by sex.

We also attach table No. 3 giving the total number of deaths for these nine causes by sex for the years 1906, 1908, 1910, 1912 and 1913, together with the per cent of gain for each of these years over the preceding year given.

From these tables it will be observed that the increase in the number of deaths reported in 1913 over 1906 for males was 36.2 per cent. This included, of course, the increase in population as well as the increase by addition of new territory added to the registration area.

While this increase was 36.2 per cent for the male population, the female population for the same period and in the same registration area only increased 34.6 per cent, but for the same period of time for the nine diseases named, the increase for the male was 68.9 per cent, or 32.7 per cent excess of the increase of the male deaths for all causes; the female deaths for the same causes for said period increased 52.7 per cent, or 18.1 per cent in excess of the gain per cent of deaths for all causes during said period in the registration district.

When to these nine causes we add the other causes of death unto which the use of intoxicating liquors is a large contributing factor, for instance, typhoid fever, pneumonia, diseases of the heart and arteries, etc., we can then realize why it is that in the year 1913, the death rate in the registration area of the United States was 87,408 more males than females.

As this area included a little less than two-thirds of the population of the United States, it is evident that there were between 130,000 and 140,000 more males died in this nation in that year than females, and this difference is largely caused by the use of intoxicating liquors. Not only is this enormous excess of death of males over that of females confronting us as a people, but that it is increasing at a much greater rate than the increase of population.

Old Mother Nature is rebelling as she always does, and through the Mortality Statistics of our government she is calling with pathetic eloquence for a remedy that will eliminate and eradicate this evil from among our people.

The National Congress has heard this call. She has answered it in part with the legislation now in question. It is now for the Judicial Department of this Government to place the seal of its judicial approval upon this step of progress that will assist in at least minimizing this evil.

TABLE NO. 1

	Males	Females	Total
1906	358,286	299,819	658,105
1908	375,497	316,077	691,574
1910	439,757	365,655	805,412
1912	459,112	379,139	838,251
1913	489,128	401,720	890,848
Per ct. gain from 1906 to 1913	36.2	34.6	35.4

TABLE NO. 2

	1906		1913	
	Males	Females	Males	Females
Alcoholism	2,390	317	3,326	418
Homicide	1,647	454	3,690	877
Suicide	4,521	1,332	7,709	2,279
Paralysis of insane	1,948	961	3,208	1,163
Cirrhosis of liver	4,036	2,043	5,788	2,709
Venereal diseases	1,266	810	2,869	1,720
Angina pectoris	1,640	1,110	2,878	1,714
Ulcer of stomach	731	692	1,483	1,053
Epilepsy	1,040	823	1,523	1,109
Per cent gain			68.9	52.7

TABLE NO. 3

	Males	Per cent Gain	Females	Per cent Gain
1906	19,219		8,542	
1908	22,324	16.7	9,342	9.4
1910	25,930	15.7	10,768	15.3
1912	29,876	15.2	12,270	13.9
1913	32,474	8.7	13,042	6.3

CONGRESS MAY DO LESS THAN ENTIRELY PROHIBIT THE TRAFFIC IN INTOXICATING LIQUORS THROUGH INTERSTATE COMMERCE.

If Congress has power to prohibit entirely the traffic in intoxicating liquors from interstate commerce, it naturally follows that the larger power includes the lesser.

The States have power to entirely prohibit the liquor traffic, but this does not prevent them from prohibiting the traffic in part. This principle was laid down in the case of

Ohio ex rel Dollison 194 U. S. 445 and in Rippey v. Texas, 193 U. S. 504, where the court said:

> "But the State has power to prohibit the sale of intoxicating liquor altogether, if it sees fit. * * * That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less. * * * In general the rule holds good, it does here."

In discussing this question, the Supreme Court of Alabama, in Sou. Ex. Co. vs. State, 66 Southern 122, said:

> "While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every State of the Union. These police regulations are not, it is true, uniform in the various States, but all the States have them. There is, therefore, a field for the operation of the Webb-Kenyon law in every State of the Union; and if the Federal Constitution, under which the government was established and which, to use the language of the Supreme Court of the United States in the Legal Tender cases, 110 U.S. 241, 14 Sup. Ct. 122, 28 L. Ed. 204, was 'intended to endure for ages and to be adapted to the various crises of human affairs, and not to be interpreted, with the strictness of a private contract,' then it would seem that, in adopting the Webb bill, Congress was exercising, not an implied, but an express power conferred upon it by the Constitution."

And on page 124 of the same opinion:

> "The power to control includes the power to limit. Congress in the Webb law, has simply placed a limitation upon commerce insofar as intoxicating liquors are concerned, and as a part of such limitations requires common carriers to refuse to accept, for transportation, or to deliver to the consignee that which is 'forbidden commerce.'"

In the case of American Express Company vs. Beer, 65 Sou., on page 581, the court said:

> "* * * A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the power to exclude it partially or when certain

conditions exist. Wickersham vs. Rahrer, 140 U. S. 545; 11 Sup. Ct. 865; 35 L. Ed. 572. Therefore it seems clear that Congress was well within its power in declaring it would be unlawful to transport into a State intoxicating liquor that is intended by any person interested therein to be received, possessed, sold, or in any manner used * * * in violation of any laws of such state," and on page 582 we find:

"It is true, that misery, pauperism and crime largely 'have their origin in the use or abuse of ardent spirits, * * * that the public health, the public morals, and the public safety must be endangered by the general use of intoxicating drink, * * * that the idleness, disorder, pauperism and crime existing in this country are, in some degree at least, traceable to this evil,' and since 'there is no inherent right in a citizen to sell intoxicating liquors,' it not being 'a privilege of a citizen of the State or a citizen of the United States,' it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question."

In the case of State vs. U. S. Express Company, 145 N. W., on page 458, the Iowa court said:

"There can be no doubt that Congress, in virtue of its power over interstate commerce might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquor to Indians, the method of shipment by express companies, the shipment of game, the carriage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions."

In the case of State vs. Doe, 139 Pac., on page 1170, the Supreme Court of Kansas said:

> "Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one State to another for immoral purposes. * * * **The plenary power of Congress includes the lesser power to permit interstate commerce in intoxicating liquors so far and under such conditions as Congress may determine.**"

Those who oppose this legislation ought not to complain because Congress is not exercising all of its power. Congress has prohibited through interstate commerce, simply the outlawed traffic in the State. Such action on the part of Congress is not only reasonable but necessary, if the laws are to be enforced. To deny the States this right, would necessitate the prohibition of all traffic in liquor from the privileges of interstate commerce, and the second condition would be infinitely worse for the liquor interests and would be of no particular benefit to those who are seeking only to protect dry territory from the outlawry of liquor dealers in other States, and are now using interstate commerce as a weapon to destroy law and order in communities where the people are making an honest effort to maintain it.

THE FEDERAL CONSTITUTION GIVES NO GUARANTY TO A CITIZEN TO RECEIVE AND POSSESS INTOXICATING LIQUOR FOR HIS OWN USE.

Unless there is found in the Constitution of the State some provision guaranteeing to an individual the right to receive or possess liquor for his own use, such right is not guaranteed by any provision of the Federal Constitution.

The case of Mugler v. Kansas, 123 U. S. 623, in which the opinion written by Justice Harlan completely answers and refutes all arguments advanced by the plaintiff in this case. In the Mugler case, Mugler was indicted and convicted for manufacturing liquor for his own personal use. Justice Harlan, for the Court, says:

> "And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general and sought to be accomplished, the entire scheme of prohibition of Kansas might fail, if the right of liquors for its own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights or liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. Crowley vs. Christensen, 137 U. S. 86."

In Preston v. Drew, 33 Maine, 558; 54 A. Dec. 639, cited in the majority opinion in Eidge v. Bessemer, 164 Ala. 594, Shepley S. J. said:

> **"The State,** by its legislative enactments, operating prospectively, **may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.**

> "It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience of law; to disturb the peace and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a Legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In the North Carolina case of So. Ex. Co. v. High Point (N. C.) 83, S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

> "There is nothing in the State or Federal Constitution which prohibits the people of North Carolina, speaking through the Legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, it following that the Legislature can equally prohibit the importation of such liquors by any person for his own use; and a fortiori it can forbid a common carrier, to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not."

The Supreme Court of Alabama in case of Southern Express Co. vs. Whittle, 69 Sou. Rep. 652, said:

> "'The government does not interfere with or impair' any one's constitutional rights of liberty or of property, when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. * * * Those rights are best secured, in our government, by the observance, upon the part of

all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.' Mugler v. Kansas, 123 U. S. 623, 662-3. Neither the Fourteenth Amendment, nor any other, 'was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people."

The Supreme Court of Idaho, case of Ex Parte Crane 151, Pac. Reporter, page 1006, recently passed upon the constitutionality of their law, which is as follows:

> "Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this act provided."
>
> "Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."
>
> "The only means provided by the act for procuring intoxicating liquors in a Prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited."

The court quoted the decision of Mugler vs. Kansas and then said:

> "Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

The position of the court is clearly correct because the prohibition of the sale and the possession of liquor is the

means for facilitating its use. If the legislative department of government decides that possession is detrimental to the public welfare, such legislative discretion should not be overthrown by the judicial department of government.

Are the laws of West Virginia prohibiting the manufacture of intoxicating liquors by a citizen for his own use, the sale of such liquors in this State, constitutional and valid only so long as a way is left open for the securing by a citizen of the State of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would have the constitutional right to sell it to a person for such purchaser's personal use; and yet, it is settled beyond a doubt that no one has a constitutional right to sell intoxicating liquors. Such a right is not one of the rights of a citizen of a State or a citizen of the United States.

In the foregoing citation from Mugler v. Kansas, the Supreme Court of the United States declared that if in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the efforts of the people against the evils attending the use of such liquors, it is not for the courts to disregard legislative determination on that question. The court then proceeded to show that so far from such regulation having no relation to the general end sought to be accomplished, the entire scheme of Prohibition as embodied in the laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized.

Precisely the same line of reasoning is applicable when we come to deal with the alleged right of a citizen to purchase and import for his own use such quantities of liquor as he might desire.

Therefore, in order to accomplish the admittedly valid main purpose it is necessary for the State under its police power to have the right to forbid the reception or possession

of liquors even for the use of the citizens. This is a step which has a fair relation to the end to be accomplished; in fact, it is necessary for the accomplishment of the main purpose.

If the decision rendered in the Mugler case was correct, it necessarily follows for the same reason that the State has the right to deny to a citizen the right to have intoxicating liquors brought into the State even for his own use, since to allow him to do so might thwart the State in the exercise of a power which is conceded to exist.

THE PURPOSE OF ALL LEGISLATION RESTRICTING AND PROHIBITING THE SALE OF LIQUOR IS TO DISCOURAGE AND PREVENT ITS USE.

Opposing counsel have assumed that the State did not want to interfere with the use of liquor because statutes have not been passed, specifically prohibiting the use of liquor or the purchase of liquor. There is good reason why the States have followed the policy outlined.

The government has found that the best way to prevent the use of liquor is to cut off the means for furnishing the liquor to the individual for his use. When the law prohibits the sale of liquor, many people who have heretofore used it, discontinue its use. In many places the people have found it necessary to prohibit the furnishing and giving away of intoxicating liquor. This further discourages and prevents the use.

In order to meet the many evasions of the law, still other legislation was required. If anyone had a constitutional, inherent right to use liquor, then all of these laws which prevent the sale and furnishing of liquor would be unconstitutional. On the other hand, all of those laws prohibiting the sale or furnishing of intoxicating liquors have been upheld. If a State finds that it is necessary in order to eliminate the further use of liquor, to prohibit the shipments of liquor into dry territory, the same reason which sustained the former laws upholds this legislation

The strongest reason for prohibiting the sale or distribution of liquor is to discourage and prevent its use. There can be but one purpose in passing these laws, and that is to prevent the use of intoxicating liquor.

In State vs. Maine 20 L. R. A., 496, the court said:

> "**It is common knowledge that it is the use of intoxicating liquor as a beverage that is deemed hurtful and is the mischief sought to be prevented by the legislation.** The prohibition of the sale of intoxicating liquors is only a means; the end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the State. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows." * * *

Taken in connection with the other legislation, its evident purpose is to further the ultimate purpose of all that legislation, viz.; to diminish the use of intoxicating liquor as a beverage.

Ex Parte Crane. 151 Pac. Rep. 1006.

The court, after quoting State vs. Gilman, 33 W. Va. 146, and State vs. Williams, 146 N. C. 618, and Com. vs. Campbell, 133 Ky. 50, said:

> "Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."
>
> "The fact is that the harm consists neither in the possession nor sale but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that if the citizen may be prohibited from having liquor in

his possession he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession (quoting Mugler v. Kansas) that the manufacture for use would tend to cripple the effort to guard the community against the ends sought to be remedied."

Lincoln vs. Smith, 27 Vermont, 320 at 337.

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained.'

"If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals, and productive of pauperism and crime; it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislation in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one the other would also fall with it.

Marks vs. State—159 Ala.—71, at page 84.

"The main object and purpose of all is the same * * * to promote temperance and prevent drunkenness. * * * The evil to be remedied is the use of intoxicating liquors as a beverage * * * and the object of the law in this particular must not be lost sight of in its interpretation."

See also State vs. Delaye, 68 S. 995, in which the court quotes the preamble of the act in question as a guide in their interpretation:

"Whereas it is the public policy of this State to discourage the use and consumption of prohibited liquors, etc.

"So. Exp. Co. vs. Whittle, 69 So.—652. The object and purpose of all laws governing the subject of intoxicating liquors is 'To promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage.

State vs. Phillips, 67 So. 651.

"The ultimate purpose and end of prohibition is to prevent the use of liquors as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step the way will be found to accomplish the end."

The United States Circuit Court of Appeals, 4 Cir. Fed. Rep., Vol. 219, No. 4, April 1, 1915, said on this question:

"In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power, rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

There is no proposition better settled than the above. It is for the purpose of diminishing, discouraging and preventing the use of liquor as a beverage that all of these laws are enacted.

WEBB-KENYON LAW VALID AS A POLICE REGULATION

Freund in his work entitled "Police Power, Public Policy and Constitutional Rights," says:

> "The Federal exercise of the police power through positive legislation rests upon the enumerated powers of Congress under the Constitution. The principal power looking to the promotion of the internal public welfare is that of regulating commerce with foreign nations and among the States. The power to regulate commerce includes the power to prohibit and suppress objectionable forms of traffic. Under this power Congress has also legislated regarding shipping and navigation, interstate common carriers, and combinations in restraint of trade.
>
> **"In view of all this legislation, it is impossible to deny that the Federal government exercises a considerable police power of its own.** This police power rests chiefly upon the constitutional power to regulate commerce among the States and with foreign nations, but not exclusively so."

The United States has exercised an ample police power over Indians partly under the commerce clause of the Constitution.

In the Rahrer case, 140 U. S. 345, it was said in sustaining the Wilson act that that act was:

> "Enacted in the exercise of its police powers and is constitutional and valid."

The lottery case above referred to holds that the Wilson act was sustained in the Rahrer case:

> "As a valid exercise of the power of Congress to regulate commerce among the States."

In the Addyson case (175 U. S. 211) the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of regarding the morals of the people of the nation or involves that purpose.

> "It may be said in a general way that the police power extends to all the great public needs." Canfield v. U. S. 167, 518, 42 L. Ed. 260.
>
> "It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong

and preponderant opinion to be greatly and immediately necessary to the public welfare." Holmes J. in Nobles State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112.

In Phalens case (8 How. 161, 168) it is observed "that the suppression of nuisances, injurious to public health or morality, is among the most important duties of government."

In the case of Hoke v. State, 227 U. S. 309:

> **"Congress may adopt not only the necessary, but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulation.**
>
> "Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack. The present case is an example. * * *
>
> "Our dual form of government has its perplexities. State and nation have different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women and more insistently of girls."

Congress in this instance has not even felt compelled to resort to "convenient" means in the exercise of its power. It has used only such power as is necessary to provide for the enforcement of law. If Congress had used its complete discretionary power, all liquors would have been denied the privilege of interstate commerce. In other words, Congress has the same power and discretion to deal with interstate commerce by enacting police regulations that the State has in enacting laws to control, or prohibit, the traffic.

LEGISLATIVE POWER MAY PROHIBIT ACTS INNOCENT IN THEMSELVES IF THE LAW-MAKING BODY THINKS THE ADMITTED EVIL CANNOT BE PREVENTED EXCEPT BY THE ENACTMENT OF SUCH A LAW.

It is well settled in law that when authority is given the Legislature or Congress to pass a law, it carries with it also authority to pass any additional legislation to make the law enforceable. This proposition is also re-enforced to the legislation now under consideration by the United States itself. Clause 18, section 8, article 1, specifically gives to Congress power to make all laws which shall be necessary and proper for carrying into execution the power given in passing interstate commerce laws. Authority is given Congress to pass a law controlling interstate commerce, and this carries with it the power to eliminate from interstate commerce any article which Congress deems to be detrimental to public morals or public health. There are many authorities for the proposition that laws may be passed by the Legislature or by Congress to make effective existing legislation. One of the familiar lines of authorities is that which prohibits non-intoxicating liquors to be sold, when the only authority given in the Constitution is to regulate or prohibit intoxicating liquors. The court upholds the law on the ground it is necessary to include innocent acts often in order to prevent the evils admitted. No one will deny that the States have full power to prohibit the manufacture and sale of intoxicating liquors. No authority

is given for the State to prohibit non-intoxicating liquors. The courts, however, have upheld such legislation because it was necessary to enforce law. The same principle is involved in national legislation in dealing with the liquor traffic.

In the case of United States vs. Cohn—Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverage and decides that whatever the States may do in that behalf, Congress may do for the territories. After quoting the statute at length, the court said:

> "No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. * * * Congress evidently had some purpose in thus changing the ordinary and common use of language."

In State vs. Frederickson, 101 Me. p. 37, the court reaffirms this proposition as follows:

> "The liquors above enumerated are declared intoxicating by law. In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in State v. Connell, 99 Me. 61: 'It is not for the jury to revise the judgment of the Legislature and determine whether a liquor is or is not intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its non-intoxicating character, as a matter of fact, becomes entirely im-

material with respect to the application of the statute. Commonwealth vs. Blos, 116 Mass. 36; Com. vs. Athens, 12 Gray 29; Com. vs. Brelsford, 161 Mass., 61; State vs. Piche, 98 Maine 348; State vs. O'Connell, 99 Maine, 61; Com. vs. Show, 133 Mass. 575; State vs. Intoxicating Liquors, 76 Iowa, 243; State vs. Guiness, 16 R. I. 401."

This power has frequently been used both by the State and Federal government to make effective, legislation which has been legally enacted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

Elder v. State, 162 Ala. 41.
State v. George, (La.) 67 South 953.
Feibleman v. State, 120 Ala. 122.
Dinkins v. State, 149 Ala. 49.
Lambee v. State, 151 Ala. 86.
Eaves' case, 113 Ga. 749, 39 S. E. 218.
O'Connell's Case, 99 Maine 61, 58 Atlantic 59.
United States v. Cohn, 32 S. W. 38.
Pennell v. State, 123 N. W. 115.
State v. Walder, 83 Ohio St. 68, 84.
State v. Frederickson, 101 Maine 36, citing.
Com. v. Blose, 116 Mass. 36.
Com. v. Athens, 112 Gray, 29.
Com. v. Brelsford, 136 Mass. 61.
Com. v. Piche, 98 Maine, 348.
Com. v. Show, 133 Mass. 575.
State v. O'Connell, 99 Maine 61.
State v. Intoxicating Liquors, 76 Iowa, 243.
State v. Guinan, 66 R. I. 401.

The latest and most convincing decision upon this question is that of Purity Extract & T. Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184; 187, involving the right of the State of Mississippi to prohibit a non-intoxicating malt liquor called "Poinsetta." It is logical, convincing and decisive on the point in question. Justice Hughes, speaking for the court, said:

"That the State, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is

undoubted."—Bartmeyer v. Iowa, 18 Wall, 189, 21 L. Ed. 929; Boston Beer Co. Mass., 97 U. S. 25, 24 L. Ed. 989; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Crowley v. Christensen, 137 U. S., 86, 43 L. Ed. 620, 11 Sup. Ct. Rep. 12. "It is also well established that, **when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective.** It does not follow that because a transaction, separately considered, is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government." Booth v. Illinois, 184 U. S. 425; 46 L. 623, 22 Sup. Ct. Rep. 168; Ah Sin v. Wittman, 198 U. S. 500, 504, 49 L. Ed. 1142, 1144 25 Sup. Ct. Rep. 756; New York Ex rel, Silz v. Hesterberg, 211 U. S. 31, 63 L. Ed. 75, 29 Sup. Ct. Rep. 10; Murphy v. Calif., 225 U. S. 623; 56 L. Ed. 1229, 32 Sup. Ct. Rep. 697. "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

It would be difficult to find a more appropriate exercise of law-enforcement power than the Webb-Kenyon law. It not only deals with intoxicating liquor, which is admittedly a proper subject matter to be controlled by such power, but to make the exercise of such power more appropriate, it deals only with outlawed liquors. When Congress is given power over the subject matter of liquor in interstate commerce, it necessarily includes power to deal with such liquors as are outlawed by the States.

CASES CITED BY APPELLANT MAY BE DISTINGUISHED

In appellant's brief upon the former hearing, it was claimed and it doubtless will be again claimed, that the Kentucky cases, **Com. v. Campbell,** 133 Ky. 60, and others following it, **Williams v. State,** 146 N. C. 618, **Eidge v. Bessemer,** 164 Ala. 599, and **State v. Gilman,** 33 W. Va. 146; support appellant's contention that under constitutional government in the United States no government has the right to deny to a citizen the right to obtain intoxicating liquors for personal use, or as complainant's counsel will probably state it, that no Government has the right to regulate the personal habits of adult citizens not under disability.

Since the first hearing of these cases before the Court, the cases from three of the States afore noted have been explained, modified, or limited, in such a way that they no longer lend support to appellant's contention. We later refer to and consider the Kentucky cases; it is desirable now to briefly review the other cases named above:

(1.)

STATE v. GILMAN, 33 WEST VIRGINIA, 146

In **State v. Sixo,** decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the Court called attention to the fact that the **Gilman Case** was decided under the previous Constitution, whereas the Prohibition amendment effective July 1, 1914, had prohibited the manufacture and keeping for sale of malt, vinous, spirituous liquors, etc., and required the Legislature to "enact such laws with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section," and in that connection, the Court said that it does not follow from the decision in Gilman's case, "that the Legislature, in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be

brought into the state, or carried from one place to another within the state;" and it cites with approval the case of Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, declaring the well-settled doctrine of this Court, in the following language:

> "It does not follow that because a transaction separately considered, is innocuous, it may not be included in a Prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

In State v. Phillips, (Miss.) 67 So. Rep, 651, the Supreme Court of Mississippi thus wrote concerning the Gilman case:

> **"In State v. Gilman,** supra, the Supreme court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors for another by any person not the owner, who had obtained a license therefor. The decision went off upon the Court's interpretation of the State Constitution, which declared "laws may be passed regulating or prohibiting the sale of intoxicating liquors, the Legislature was without power to pass the statute. The Court also held that the statute could not be upheld as coming within the police power of the State. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides the question before the Court was complicated by the Constitution of West Virginia."

In the **Gilman case,** decided November 9, 1889, two questions were considered: (1) Whether the statute prohibiting one from keeping in his possession liquors for another was violative of the Fourteenth amendment of the Federal Constitution, and (2) Whether it was violative of a provision in the then State Constitution, declaring that laws may be passed regulating or prohibiting the sale of intoxicating liquors within the State. The decision on the second

ground is without value now, because the constitutional provision has been superceded by the Prohibition amendment of West Virginia effective July 1, 1914. In so far as the decision was rested on the Fourteenth amendment of the Federal Constitution, it cannot now be accepted for several reasons. It is entirely out of harmony with subsequent decisions of the Supreme Court of the United States, and particularly with the case of **New York v. Hesterberg,** 211 U. S. 31, and **Patsone v. Penn.,** 232 U. S. 138. Furthermore, in **State v. Davis,** No. 2864, decided November 30, 1915, the Supreme Court of West Virginia said in regard to a statute prohibiting the advertising of liquors:

> "A liquor dealer residing and doing business in another State, who by the agency of the United States mails, sends into this state unsolicited and there circulates or distributes to prospective customers, price-lists, circulars, and order blanks advertising his liquors for sale, and which he proposed to ship into this State to them, and which advertising matter by such agency is actually delivered to a citizen of this State, is guilty of a violation of Section 8, Chap. 15, Acts of the Legislature of 1913, known as the Yost law, and may be indicted and punished as provided by such act. . . .
>
> "To so construe said act by virtue of the Acts of Congress known as the Wilson act and Webb-Kenyon act, does not infringe on the commerce clause of Section 8, Article 1, of the Federal Constitution.
>
> "Nor does the provision of Section 8 of said Act of 1913 so construed and applied, violate the privileges and immunities clause of the Fourteenth amendment of the Federal Constitution."

(2.)

EIDGE v. BESSEMER, 164 ALABAMA, 599

This case was distinguished in former hearing, but since then it has been destroyed as any authority here by the later decision of the Supreme Court of Alabama in **Southern Express Co. v. Whittle,** 69 So. Rep. 682, decided June 17, 1915.

In that case the Supreme Court of Alabama held that it was competent for the Legislature of Alabama to pass a statute limiting the quantity of liquor that a citizen might receive or possess for personal use, and further that the State had the same right under the police power to totally prohibit receipt and possession or importation of liquor, that it had to prohibit its manufacture.

The Court dealt specifically with the **Eidge case** and explained that it could not be regarded or accepted as a governing authority in the case then in hand, for the several reasons stated, one of which was that the **Eidge case** dealt with an ordinance of a Municipality and not with a statute of the State—the ordinance going beyond and in advance of any State statute then of force.

It is interesting to note also that the Supreme Court of Alabama in the **Whittle case** disapproved the majority view in the case of **State v. Williams,** 146 N. C. 618 and stated that it would not follow the case of **West Virginia v. Gilman,** 33 W. Va. 146, since it was opposed to the doctrine or principle in the Alabama case of **Williams v. State,** 179 Ala. 50.

(3.)

STATE v. WILLIAMS, 146 NORTH CAROLINA 618

The majority opinion in the above case has been declared unsound by the Supreme Court of Alabama in **Southern Express Co. v. Whittle, 69** So. Rep. 652, and by the Supreme Court of Mississippi in **Phillips v. State,** 67 So. Rep. 651.

The Supreme Court of North Carolina itself, in the case of **Glenn v. Southern Express Co.,** decided December 1, 1915, has had occasion to consider the **Williams case.** After sustaining the North Carolina anti-shipping law, similar in principle to the Alabama anti-shipping law, and preparatory to following the decision of the Alabama Court in **Whittle's case,** Mr. Justice Allen, speaking for the whole Court, said that the question as to whether common carriers might not be forbidden to transport intoxicating liquors

into Prohibition territory was not decided, but expressly reserved, in **State v. Wiliams,** 146 N. C. 618. It was then said in the opinion:

> "The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principle difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced for sale, and the bringing in of such liquors as being for personal use when intended for sale has been such a prolific source of evasion of Prohibition laws, that restrictions upon the right of delivery into the State are necessary to prevent illicit sales."

The Court then cited with approval the following from **Mugler v. Kansas,** 123 U. S. 623.

> "Nor can it be said that government interferes with or impairs anyone's constitutional right of liberty or property when it determines that the manufacture or sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore a business in which no one may lawfully engage."

The argument of the appellant against the West Virginia law is based upon the false assumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the State that guarantees to its citizens this right, then there is no such right. The following propositions are well-settled:

There is no inherent right in a citizen to sell intoxicating liquor as a beverage for personal use, as was held in **Crowley v. Christensen,** 137 U. S. 86.

No one has any constitutional right to manufacture liquor for his own use. **Mugler v. Kansas,** 123 U. S. 623.

No one has a constitutional right to have a solicitor offer to sell him intoxicating liquors for his own use from outside of the State, even though it is contemplated that

an interstate carrier bring the liquor to him. **Delamater v. State,** (S Dak.) 205 U. S. 93.

No one has a constitutional right to have liquor advertisements sent to him, in order that he may buy liquor for his own use. **State v. Delaye,** 69 So. Rep. 993.

All anti-liquor prohibitory statutes are designed to reduce, restrict, or prevent the personal use or consumption of intoxicating beverages.

As the Supreme Court of Mississippi well said in **State v. Phillips,** 67 So. Rep. 651.

> "**If the object of Prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale.** Of course the typical public saloon is demoralizing, but there would be no particular difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, **except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of Prohibition is to prevent the use of liquor as a beverage.** This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

14

THE NECESSITY FOR AND PURPOSE OF THE WEBB-KENYON ACT

For half a century prior to 1888, the Courts recognized the jurisdiction of the State over interstate shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of Bowman v. Northwestern, 125 U. S. 500, and in the subsequent case of Leisy v. Hardin, 135 U. S. 124. In reversing this policy, the Court predicated its announcement,

not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammeled."

The Wilson act followed very soon after the decision of Leisy v. Hardin, 135 U. S. 124, 34 L. Ed. 128; and the construction placed on the Wilson act in Rhoades v. Iowa, 170 U. S. 412, 42 L. Ed. 1088, started the movement for further congressional relief that would enable the States to enforce their laws, and notably their police laws, without infringing upon the right of Congress to regulate commerce. The use of the words "received, possessed, sold, or in any manner used in violation of any law of such State, etc." shows Congress intended to recognize to the fullest extent whatever valid State laws might be enacted prohibiting or regulating the receipt, possession, sale or other use in any manner, of the liquors mentiond in the act.

Whereas under the Wilson act, interference by the State could not occur until after delivery to the consignee whereby under the commerce clause of the Federal Constitution the consignee had the right to order and receive such liquors for his own use (Vance v. Vandercook, 170 U. S. 428, 42 L. Ed. 1100), now under the Webb-Kenyon law, shipment into a State is prohibited by Congress if any person interested therein intends to receive, possess or in any manner use, as well as to sell such liquor in violation of the State law.

In the case of West Virginia v. Adams Express Co. 219 Fed. Rep. 794, paragraph 13 of the opinion, the Court dealt with the contention that was made by opposing counsel, to the effect that the quoted language of Mr. Justice White in Vance v. Vandercook Co. 170 U. S. 438, gave countenance to the notion that Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a Prohibition State, but the Court said in reference to the quoted language, that:

> "It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally, deleterious substances."

This idea is later on further elucidated by Justice White in American Express Co. v. Iowa, 196 U. S. 133; 49 L. Ed. 417, where after stating the points decided in Leisy v. Hardin & Rhoades v. Iowa, and stating that the doctrine in those cases was applied in Vance v. Vandercook Co. 170 U. S. 438, to the right of a citizen of South Carolina to order from another State for his own use merchandise consisting of intoxicating liquors to be delivered in the State of South Carolina, he said:

> "Those cases rested upon the broad principle of the freedom of commerce between the States and the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of a citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the State where made."

The Webb-Kenyon Act was intended to alter the rules above declared and to relieve the police power of the State from the dominion, under which it had long rested, of the commercial clause of the Federal Constitution. The existence and extent of the police power of the State and the former supremacy of the commerce clause of the Constitution over the police power will be clearly brought forth by considering two paragraphs from the opinion of Chief Justice Fuller in United States v. E. C. Knight, 156 U. S., L. Ed. 325, where he said:

> "It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always

belonging to the States, not surrendered by them to the general Government, not directly restrained by the Constitution of the United States, and essentially exclusive.

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several States, and if a law passed by a State in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

The Webb-Kenyon Act removed this conflict between the police power of the State and the exclusive power of Congress to regulate commerce, insofar as intoxicating liquors are concerned, by declaring that such liquors should become outlaws and contrabands of commerce, "when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State."—Hence, for the first time, from and after March 1, 1913, the States were placed in a position where they could exert their police power to the fullest extent to secure real and effective Prohibition of the liquor traffic within their borders, and to reduce, resrict, or entirely prevent, if they deemed best to do so, the possession, or rceipt of intoxicants, unless, of course, there be some provision in their State Constitutions which prevented their exerting their police power to this extent. Congress no longer permits the declared and legal policy of the States, seeking to protect their people against the mischiefs of intoxicating alcoholic poisons, to be overthrown or disregarded by the agency of interstate commerce.

This Court enunciated this safe and fundamental principle in the case of Champion v. Ames, 188 U. S. 356, in the following language:

> "In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said in effect THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE."

The same reasoning which guided the Court in this great decision can with greater force be applied to the case at bar. The people of the States in their struggle to advance civilization and eliminate this great evil have prohibited the liquor traffic in the smaller units of Government and in 19 of the States. They made this advancement on the theory that the electorate in every unit of Government have an inherent right to better their conditions whenever the legally constituted majority in such territory desire so to do in a legal manner. As civilization advances, new conditions arise. Old customs, and traffics, which were once permitted and sanctioned, under the searchlight of truth and science are found to be injurious and are eliminated. Our Constitution, as the Supreme Court of Kansas has well said, has the marching quality in it. It opens the way for progress when the people are ready for it. Through decades of hard work, and great sacrifice the electorate have abolished the liquor traffic in 80 per cent of the area of this country. At each step of advancement they have been met by the stubborn opposition of the liquor interests. Every attempt to further curtail the liquor traffic was met by some new scheme to

evade the law. Their last refuge is the interstate commerce provision of the Constitution.

After the saloon and beverage traffic is prohibited in a State, the liquor interests use the railroads and express companies as their bartenders to force their liquor into this territory. To require the officers of the State to wait until the liquor is delivered and then watch for an overt act of lawlessness, is placing an unreasonable and unnecessary burden upon the officers and the people who have done their best to free themselves from what they consider a curse.

Surely the State is entitled to this much protection from the Federal Government. It was granted to the States in the case of lotteries and it did not cause a fraction as much crime and misery and poverty as the liquor traffic produces. Even more consideration should be given States in combating the evils of the liquor traffic than was granted to them in suppressing the evils of lotteries.

Congress has granted this relief and the States have received a new impetus in their handicapped effort to enforce the law. It is inconceivable that a great Nation like this whose fundamental purpose is to promote the general welfare should allow any of the States to be crippled in their effort to enforce laws for the public good.

The Federal Constitution was never intended by our forefathers to be an instrument to protect lawlessness. It has always been construed so as to aid officers in the performance of their duties in enforcing law.

15

PUBLIC POLICY AND THE PRESUMPTION OF CONSTITUTIONALITY

Unless there is such conflict between the law and the Constitution that cannot be reconciled, it should be sustained.

In United States v. Harris, 106 U. S. 635; 27 L. Ed. 290; Mr. Justice Woods, speaking for the Court said:

> "Proper respect for co-ordinate branch of the Government requires the Courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In A. T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

> "It is also a maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purposes of promoting the interests of the people as a whole, and Courts will not lightly hold that an act duly passed by the Legislature was one in the enactment of which it transcended its powers."

In Brown v. Walker, 161 U. S. 590; 40 L. Ed., 819, Justice Brown, speaking for the Court, says:

> "That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in Fletcher vs. Peck, 10 U. S. 88; 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the Judge feels a clear and strong conviction of their incompatibility with each other.'"

In United States v. Gettysburg Elec. R. Co., 160 U. S. 668; 40 L. Ed. 576, the Court speaking through Mr. Justice Peckham said:

> "In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such an act is presumed to be valid unless its invalidity is plain and apparent; no presumption or invalidity can be indulged in, it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the

> foundation of the Government. * * * That an act of Congress which plainly and directly tends to enhance respect and love of a citizen for the institution of his country, and to quicken and strengthen his motives to defend them * * * must be valid."

The above decisions, and many others, have given assurance to the people that when they are striving to promote the public good and the sobriety and welfare of the people, that laws reasonably adapted to carry out that purpose will be sustained. Public sentiment, and the overwhelming majority of Congress, agreed that the outlawed liquor traffic should not have Federal protection through interstate commerce. Such a law is reasonably adapted to the end sought. The State of West Virginia has prohibited the manufacture and sale of liquor for beverage purposes. In order to secure the benefits of their organic statutory law, they found it necessary to prevent the soliciting of orders through the mails, the possession and receipt of intoxicating liquor through common carriers.

All of these laws have a direct bearing upon the main purpose sought, namely, to promote sobriety among the citizenship of the State, and to limit and discourage the use of intoxicating liquor. When it is conceded that the State may prohibit the manufacture, sale and distribution of intoxicating liquor as a beverage within the State, it logically follows that to make those laws enacted under the police power effective, the means for securing liquors from outside of the State must be inhibited also by the legally constituted authority, to-wit; Congress. The Federal legislative authority has enacted the law to divest such outlawed liquors of their interstate character. The State, under the authority of the new Constitution and police power, has wisely used its discretion in prohibiting practically every phase of the beverage traffic. This furnishes us what Justice Johnson called in his concurring opinion in Gibbons v. Ogden, 9 Wheat, 1—"A frank and candid cooperation for the general good."

16

THE PROTECTION OF PUBLIC HEALTH AND PUBLIC MORALS A NECESSITY

It is well settled that the safeguarding of the public health and public morals is essential to the perpetuity of Government. Whatever else the police power may include, it admittedly grants to the government the right to protect these two essentials—the public health and the public morals. This necessarily means that the Constitution must be construed, as new conditions arise, so as to carry out its fundamental purpose. This is what the Supreme Court of Kansas had in mind when they quoted in their recent decision from Willoughby on the Constitution:

> "The national Constitution, under the guidance of our great Court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of progressing history."

This theory is in complete harmony with the decision of this Court in the case of United States vs. Gettysburg, supra, and the application of that case made by the Kansas Supreme Court, to-wit: "It is of as much national importance to make a man sober as to make him patriotic."

The above decisions deal with the very fundamentals of government. Without public morals, public health and patriotism, government itself would cease to exist. Any law which has reasonable relation to the safeguarding of these fundamentals of government and is not in irreconcilable conflict with the Constitution, must be valid. Relying upon these well recognized principles found in the most enlightened public conscience and Court decisions, the people have patiently and persistently and against great odds opposed the beverage liquor traffic until the following States and subdivisions have outlawed it.

The absolute prohibition of the sale of intoxicating liquors for beverage purposes has been adopted by nine-

teen States, Maine, Kansas, North Dakota, Georgia, North Carolina, South Carolina, Oklahoma, Mississippi, Tennessee, West Virginia, Virginia, Colorado, Washington, Oregon, Arizona, Iowa, Idaho, Alabama and Arkansas.

The Legislatures of twenty-four other States (California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont and Wisconsin) have by law prohibited the sale of intoxicating liquors in certain classes of political subdivisions, prohibition becoming operative whenever a majority of the electors in a regular or special election indicate by vote that they wish the provisions of the law to apply.

In still other States the Legislatures have arbitrarily placed certain areas under prohibition legislation, thus adding to the aggregate population in prohibition territory. Since September of 1914, ten States have adopted Prohibition. The steady growth of territory which seeks protection from a law like the one in question is shown by the following facts:

Four States dry in 1907;
Five States dry in 1908;
Nine States dry in 1909;
Ten States dry in 1914;
Nineteen States dry in 1916.

In Utah the Legislature prohibited the traffic. The Governor of the State waited until after the Legislature adjourned, then vetoed the measure. The next Legislature will doubtless enact a prohibitory law. About five other States have fixed dates for elections for a State vote, and most if not all of them will be successful in abolishing the liquor traffic.

Approximately 80 per cent of the territory of the United States has abolished the beverage liquor traffic, and about 57 per cent of the population live in that territory.

With the majority of the people of the States living in dry territory, and an increase of those who live in dry territory amounting to 1,500,000 on the average every year for 20 years, the public necessity for this law is certainly manifest.

As a result of the rapidly growing sentiment against the liquor traffic and the more effective means at hand for enforcing the law, the decrease in the sale and consumption of liquor has been marked the last year. According to the official United States Government Report, published recently by Internal Revenue Commissioner, Mr. Osborne:

> "The consumption of fermented liquors decreased for the past year . . . 200,300,436 gallons.
>
> "And the consumption of distilled liquors decreased 14,983,333 gallons.
>
> "Or a total decrease in consumption of all liquors 215,283,769 gallons.
>
> "Estimating the population of the United States at one hundred million, this report shows a decrease in consumption of 2.15 gallons per capita.
>
> "That is the largest decrease in liquor cosumption ever reported for any one year in the nation's history."

This report shows a decrease in the number of liquor dealers of 16,270 for the year or at the rate of forty-four per day for the year ending June, 1915.

Should this part of our citizenship, battling against one of the nation's greatest evils, be limited or discouraged in a laudable effort to have laws enforced for an eminently legal purpose? The power to reach violations of law must be lodged somewhere in government. The State has prohibited the traffic and all of the incidents of the traffic which produce the recognized evils within their borders. Congress has divested intoxicating liquor of its interstate character when it is shipped into the State in violation of the State laws. Both the Federal and the State government have tried to follow the rule laid down by this Court

in the case of Hoke vs. State, 227 U. S. 309, where the Court said:

> "Our dual form of government has its perplexities, state and nation have different spheres of jurisdiction as we have said. But it must be kept in mind that we are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently **to promote the general welfare materially or morally.**"

Both the material and moral welfare of the State of West Virginia are involved in the outcome of this case. In spite of the determined opposition of the liquor interests from outside the State and their effort to break down the enforcement of the law, the public good has been greatly advanced by the operation of these statutes. The public records show crime has been reduced 60 per cent and the arrests for drunkenness 50 per cent in the last year, ending July, 1915. With the aid of this law, if sustained, and the State laws which are involved in this hearing, still greater results will follow.

The material welfare has been advanced equally with the moral welfare. Governor Hatfield recently gave the following testimony concerning the operation of these laws:

> "While West Virginia loses about $700,000 a year in revenue from the saloons, within the next few years we expect to reduce our State expenses for the handling of criminal charges, and the maintenance of state asylums that will offset the loss from the revenue paid for legalizing the saloon traffic.
>
> "We feel that our standard of civilization will be higher, and that the generations to come in West Virginia will be better from the standpoint of strength, intelligence, education and other environments which means so much to the success of a great and growing State, unlimited in natural wealth such as ours, and upon which depends our standard of citizenship as to what the future of our State and its achievements may be."

The States that are making the fight to maintain the standard of sobriety and morality should be encouraged and unhampered. Every reasonable doubt should be resolved in their favor in sustaining a law intended for the public good. This Court has construed the Federal Constitution broadly from time to time as the necessity arose for legislation to eliminate the evils that injure public morals. The same wise, far-seeing policy which has been used in sustaining similar laws in the past will uphold this law. Precedent, reason and enlightened public policy furnish a safe basis for sustaining the constitutionality of the Webb-Kenyon law.

17

WEST VIRGINIA STATUTES INVOLVED IN THIS HEARING

The provisions of the West Virginia statutes which are in controversy in this hearing are as follows:

> The prohibition of the receipt, or possession of intoxicating liquor from a common carrier.

18

WEST VIRGINIA STATUTES AUTHORIZED AND VALID

The statutes in question are a valid exercise of the police power and of the authority granted in the Constitution of West Virginia.

19

POLICE POWER

The liquor traffic is peculiarly subject to the police power of the State and there is no inherent right to engage in it, which may not be regulated, or prohibited. The Court decisions are uniform on this one proposition at least, that the liquor business is of a character so menacing to the public welfare that no person can claim an inalienable right to engage in it. No one can complain, if, having chosen this vocation, his business is regulated, or pro-

hibited, by law; whatever the property loss to him may be or whatever means is devised by the State to accomplish such regulation, or Prohibition, so long as such means are reasonable and necessary to affect the purpose designed.

Nowhere is the anomalous character of the liquor business, and the right of the State to deal with it, free from constitutional limitations, State and Federal, which protect other property interests, better stated and defined than in the so-called License cases in 5 Howard, 504. Chief Justice Taney at page 577 put the proposition thus:

> "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

In Beer Co. v. Mass., 97 U. S. 33, it was contended that since the adoption of the Fourteenth Amendment to the Federal Constitution the right to sell intoxicating liquors was secured to citizens in every State, but this Court of the United States swept such a claim aside with the remark that, "so far as such a right exists it is not one of the rights growing out of a citizenship of the United States."

In this same case the contention was made that while the Legislature might prohibit an individual from engaging in the manufacture and sale of intoxicating liquors, a corporation could not be so prohibited because of the contract with the State expressed in its charter. The Beer Company had been organized "for the purpose of manufacturing malt liquors in all their varieties," and insisted that this corporate power granted in their charter could not be taken away. Mr. Justice Bradley, delivering the opinion of the Court, said:

> "The right to manufacture, undoubtedly as the plaintiff's counsel contends, included the identical right to dispose of the liquors manufactured, but al-

> though this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

The fact is everywhere recognized that the liquor traffic is not to be treated as an ordinary, legitimate business entitled to equal protection with other pursuits. As the Court says in State ex rel Judges, 50 U. J. L., at page 595:

> "The sale of intoxicating liquors has from the earliest history of our State been dealt with by the Legislature in an exceptional way. It is a subject by itself, to the treatment of which all analogies of the law appropriate to other topics cannot be applied."

This characterization of the liquor business "as a subject by itself," necessitating treatment by the Legislature "in an exceptional way" is everywhere to be found in the cases. The business of dealing in intoxicating liquors is universally recognized as a vocation suffered rather than favored by the State. To borrow an analogy from the law of torts, the liquor business is to be treated with the respect due to a trespasser upon the premises of society rather than with the care due an invited guest. The property of the saloonkeeper cannot be wantonly or unnecessarily destroyed, nor can arbitrary or needless discrimination be made among or between those engaged in this pursuit; but everything short of this can be lawfully done which the legislative power deems wise and expedient in lessening or eradicating the evils of this commerce.

Well and forcibly did the former Chief Justice of the Supreme Court of the United States put this proposition.

In Giozza v. Tiernan, 148 U. S. 657, Mr. Chief Justice Fuller says, at page 61, in speaking of the constitutionality of laws regulating the sale of liquors in Texas:

> "The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national Government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

Here we have a clear statement going to the very fundamentals in defining the limit, if any there be, to the exercise of that power residing in every State to guard against the evil of a traffic which menaces the health, the morals and the safety of the people. Of course, a State Constitution may restrict the exercise of the police power in any direction, or may express more clearly the freedom from such restrictions. But so far as a uniform rule can be stated it is to the effect that the business of dealing in intoxicants as a beverage is one having no inherent or inalienable rights; it is one for which no constitutional guaranties were written, and is to be protected only in case the legislative authority attempts in a pretended exercise of the power to regulate or prohibit it, to needlessly destroy property or arbitrarily discriminate between those against whom its power is directed.

20

DECISIONS FROM MANY COURTS SUSTAIN THE VIEW THAT THE CHARACTER OF THE LIQUOR TRAFFIC IS SUCH THAT IT CANNOT INVOKE THOSE CONSTITUTIONAL GUARANTIES WHICH PROTECT OTHER PERSONAL AND PROPERTY RIGHTS.

Decisions without number and from practically every jurisdiction in this country could be cited to support the general principles we contend for herein. We cite a few of the more important, going particularly to the proposition that the liquor business is peculiarly within the police power; that there is no right to engage in it which is protected by constitutional limitations; that it can not claim the inviolability of property or the equal protection of the law in the same sense that personal, political and property rights generally invoke it, and finally that there is no limit to the measures that may be devised to mitigate this evil or destroy it altogether, so long as such measures are designed to accomplish that purpose only and treat all alike who are alike engaged in the unwholesome trade.

Foster vs. Kansas, 112 U. S. 201, 28 L. Ed. 629.
Boston Beer Co. vs. Mass., 97 U. S. 25, 24 L. Ed. 989.
Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.
Kidd vs. Pearson, 128 U. S. 1.
Crowley vs. Christensen, 137 U. S. 91, 34 L. Ed. 620.
Goddard vs. The Town of Jacksonville, 15 Ill. 589.
Our House No. 2 vs. The State, 4 Freem. (Iowa). 172; Beebe vs. State, 6 Ind. 542.
State ex rel. vs. Crawford, 42 American Reports, 186.
Thurlow vs. Commonwealth of Mass., 5 Howard, 504.
State vs. Kansas, 80 Pacific, 987.
Crowley vs. Christensen, 137 U. S. 86.
Santo et al vs. State, 2 Iowa, 165-190.

21

CONSTITUTION OF WEST VIRGINIA FURTHER ELUCIDATES POLICE POWER

In 1912 the people of West Virginia adopted the following amendment to their constitution:

> "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

In addition to the police power of the State, this amendment to the Constitution makes clear the purpose of the sovereign people of West Virginia. The manufacture, sale and keeping for sale of all liquors for beverage purposes is prohibited. The sale for medicinal, pharmaceutical, mechanical, sacramental, scientific and industrial purposes may be authorized by the Legislature. The General Assembly cannot, however, permit the beverage traffic or distribution. If the people of West Virginia are rightly prevented from selling liquor for personal use or from manufacturing it for personal use for beverage purposes, it logically follows that no one in that State has any inherent or legal right to have it sold, or manufactured for their own use as a beverage. In enforcing this provision of the Constitution, laws were passed preventing the sale, furnishing and giving away of intoxicating liquor as a beverage. All so-called soft drinks which are commonly used as a subterfuge in the distribu-

tion of liquor were prohibited; solicitation was prohibited. A law was enacted making the place of delivery the place of sale, and also to prohibit persons from receiving or having in their possession intoxicating liquors received from a common carrier. All of these laws were enacted for the sole purpose of making effective the provisions of the new constitution.

IF A STATUTE PURPORTING TO BE PASSED TO PROTECT PUBLIC HEALTH, PUBLIC MORALS, PUBLIC SAFETY, AND PUBLIC WELFARE HAS REAL AND SUBSTANTIAL RELATION TO THOSE OBJECTS, IT IS A PROPER EXERCISE OF THE POLICE POWER, AND THE COURTS HAVE BEEN LIBERAL IN SUSTAINING SUCH STATUTES.

> Mugler vs. Kansas, 123 U. S. 623, 660, 31 L. Ed. 205, 210 8 Sup. Ct. Rep. 273; Plumley vs. Mass., 155 U. S. 461, 39 L. Ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Powell vs. Penn. 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257; Slaughter-house Cases, 16 Wall, 36, 21 L. Ed. 394.

This same rule has been followed in construing statutes under the police power prohibiting the liquor traffic. In Lincoln v. Smith, 27 Vt. 320, at 337, the Court said:

> "The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

Mark's vs. State, 155 Ala. 71.

> "The evil to be remedied is the use of intoxicating liquors as a beverage * * * and the object of the law under this principle must not be lost sight of in its interpretation."
>
> See also State vs. Delaye, 68 Southern 995, ex parte Crane, 151 Pac. Rep. 1006; also State vs. Maine, 20 L. R. A. 496; Purity Extract Co. vs. Lynch, 226 U. S. 201.

22

DO THE WEST VIRGINIA STATUTES HAVE A REASONABLE RELATION TO THE PURPOSE SOUGHT TO BE ACCOMPLISHED?

Both the Constitution and the State laws prohibit the sale and distribution of intoxicating liquor, as above set forth. These laws were enacted under the Constitution and the police power of the State to protect public morals and promote the public good. The real purpose of these laws is to prevent and discourage the use of intoxicating liquor as a beverage, because it is hurtful to the individual and the community. In order to accomplish the purpose, laws had to be enacted to prevent liquor dealers from outside the State from sending the deleterious commodity into the State. Opposing counsel do not claim there is any lack of authority to prevent this distribution or use within the State, but denies that either the State or the Federal legislative power may prevent its shipment for personal use from without the borders of the State.

Congress has enacted the law to give relief so far as a Federal Government is responsible for these shipments through the agencies of interstate carriers. The state has supplemented this legislation by enacting laws authorized under the Constitution and police power of the State. The laws prohibiting possession or reception of liquor as a beverage were enacted to carry out the purpose authorized in the Constitution of West Virginia. The law making the place of delivery the place of sale has a vital relation to the end to be sought by this legislation. Mr. Blue in his brief has presented fully the reasons and authority for sustaining this provision of the law.

23

RECEIPT AND POSSESSION OF LIQUOR FROM A COMMON CARRIER

The State not only has the right to prohibit certain acts, but also the right to prohibit the possession of the

instrument for accomplishing those prohibited acts, even though such instruments may be harmless in themselves. This principle was established in the case of Patsone v. Pennsylvania, 232 Sup. Ct. Rep., page 138.

In this the purpose of the statute was to protect game for food supply. The law was sustained which prevented unnaturalized citizens from shooting such game or having in their possession certain firearms by means of which they might shoot such game.

The Court said in discussing this question:

> "The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." Lindsley vs. National Carbonic Gas Co., 220 U. S. 61, 80, 81, 55 L. Ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." Central Lumber Co. vs. South Dakota, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 Sup. Ct. Rep. 66; Rosenthal vs. New York, 226 U. S. 260, 270, 57 L. Ed. 212, 216, 33 Sup. Ct. Rep. 27; L'Hote vs. New Orleans, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788. See further Louisville & N. R. Co. vs. Melton, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. "The question, therefore, narrows itself to whether this Court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Bar-

rett vs. Indiana, 229 U. S. 26, 29, 57 L. Ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this Court ought to be very slow to declare that the State Legislature was wrong in its facts."

It is manifest that the means for accomplishing the purpose of a constitutional amendment must be construed with a great deal of latitude, and the body which is best equipped to determine how far the State should go, is the Legislature itself. The chief obstacle in the enforcement of law in a prohibition State is the common carrier. Through the means of such common carrier attempt is made to furnish liquor to the people, just as was formerly done through the saloon. If this is permitted and as much liquor should be consumed by the people, then there would be little or no advantage in the passage of the prohibition laws.

In order to prevent this agency of distribution, the Legislature decided that the most effective means was to prevent the possession or receipt of liquor from a common carrier. All carriers are treated alike, both inter and intrastate carriers.

This statute not only has a reasonable relation to the purpose to be accomplished, but is a necessary aid in the reasonable enforcement of the law. If any person is permitted to receive the liquor and possess it from a common carrier, it forms an unnecessary burden upon the officer of the law to watch the individual until an overt act of lawlessness is committed. To make law enforcement hard is not the function of government or the proper construction to be placed upon statutes intended for the public good.

We have already established in another part of this brief that no individual has any constitutional right to possess liquor for beverage purposes. If he has no right to possess liquor for this purpose, it then follows that the Legislature may prohibit him from receiving such liquor

from any agency which may be used as an easy means to accomplish the violation of the law.

If a foreigner may be prevented from having a shotgun because it is a means by which he would kill game, certainly the act in question in this statute may be prohibited without even approximating the length to which this Court went in upholding the Pennsylvania statute.

The power now residing in the State is clearly set forth in the case of Southern Express Company vs. Whittle, Southern Reporter 652:

> The Webb-Kenyon law "prohibits the shipment or transportation of liquor from one State into another, not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed, or in any manner used in violation of the State law."—State of West Virginia vs. Adams Express Co., supra. "There is nothing in the Webb-Kenyon law to indicate any intention to restrict its beneficent and considerate effect to only those cases where total prohibition, with respect to the sale, receipt or possession of intoxicating liquors, is the statutory status in a State. The dominant idea in the law is to deny the privilege and protection of lawful interstate commerce to the instrument of intended violation of any valid State law affecting the use, possession, receipt, etc., of intoxicating liquors. The plain terms of the statute inhibit any right to enter intoxicants in interstate commerce where the purpose is unlawful."

The State is now free to exercise its police power to the extent of prohibiting either the possession, or receipt, of intoxicating liquors. These are the incidents leading to its use which will produce the evil sought to be remedied.

The Supreme Court of Idaho in discussing this point said with reference to the statute in that State: 151 Pac. Rep. 1006:

> "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for

scientific or medicinal purposes, or for compounding or preparing medicines so that the possession of whisky or any intoxicating liquor other than wine and pure alcohol for the uses above mentioned, is prohibited."

The Court further said:

"Does the statute purport to have been enacted to protect the public health and public morals and public safety? Has it a real and substantial relation to those objects, or is it on the other hand a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation, address themselves to the legislative and judicial branch of the government. * * *

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession;' and since that great difficulty has been encountered in enforcing the prohibitory laws the statement made by the learned jurist in the case of Mugler vs. Kansas, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage might well be said with respect to its possession, which would make it read:

"'And so if, in the judgment of the Legislature the manufacture of intoxicating liquors * * * would tend to cripple, if not defeat, the effort to guard the community against the evil attending the excessive

use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."'

The Court reasons directly to the point in showing what the purpose of this legislation is and then concluding that the statutes in question were intended to help aid in the execution of those statutes.

A STATE HAS A RIGHT TO CLASSIFY SUBJECTS FOR THE PURPOSE OF EXERCISING THE POLICE POWER.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25, L. Ed. 989; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 141, 107 S. W. 710; St. Louis I. M. & S. R. Co. v. State, 86 Ark. 518, 112 S. W. 150; Badenoch v. Chicago, 222 Ill. 71, 78, N. E. 31; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L. R. A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Slaughter-house Cases, 16 Wall. 36, 21 L. Ed. 394; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 236, 2 Inters. Com. Rep, 232, 9 Sup. Ct. Rep. 6; McCready v. Va. 94 U. S. 391, 24 L. Ed. 248.

Classification may be properly based upon the "degree of evil" designed to be remedied.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. Ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. Ed. 1022, 1024, 33 Sup. Ct. Rep. 715.

In the exercise of the police power there is no limitation on the classification of objects affected so long as there is no arbitrary or unreasonable classification.

As Justice Fuller said in the case of Giozza vs. Tierman, 148 U. S. 657:

> "The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

24

THE WEST VIRGINIA STATUTES PROVIDE REASONABLE CLASSIFICATION IN THEIR PROHIBITION.

The laws of West Virginia relating to the shipment of liquor into the State deal with agencies which are in a class by themselves. The man who attempts to manufacture liquor in the State is penalized by the laws prohibiting the manufacture for beverage purposes. If he purchases the liquor from an illegal manufacturer and attempts to distribute it, the law prevents this.

The one great source of distribution of liquor came through the common carrier and it is a natural classification to prohibit the receipt or possession of intoxicating liquor from this agency.

One of the objections raised to this kind of legislation is stated in Freund on Police Power, section 738, "Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted." The statement of this objection makes clearer than ever the reasonableness of the legislation in question. The special danger confronted in West Virginia was the shipment

of liquor through the channels of commerce. The State could only prohibit acts within her jurisdiction. The sale, furnishing and manufacture of liquor was prohibited. The next step for the State was to prohibit the possession and receipt of liquor from these agencies which aided law-breaking from without the borders of the State.

The receipt and possession of liquor from other agencies than common carriers are taken care of by other laws. The laws in question are simply part of a system of legislation intended to prevent and discourage the sale, furnishing and use of intoxicating liquor as a beverage.

25

TRANSACTIONS ACCESSORY OR INCIDENTAL TO BRINGING LIQUORS INTO THE STATE AND THE DISPOSITION OF THEM MAY BE PROHIBITED.

The proposition is well settled that any transaction which is incidental to an unlawful business may be prohibited. This is not only another phase of the principle applied by this Court in the case of the Purity Extract Co. vs. Lynch, supra, where it was held that an innocent act may be prohibited, if it is necessary, in preventing an evil which may be properly inhibited. That such incidental transaction may be prohibited was settled in the case of Delameter vs. South Dakota, 10 Am. Eng. Anno. 733.

Before the passage of the Webb-Kenyon law this case was sustained under a statute which prohibited the soliciting of orders for liquor even though the place where the order was filled and completed was outside the State. The Court sustained the law on the theory that the transaction was accessory or incidental to the business of bringing liquors into the State and disposing of them in violation of the State law.

Unless such a rule is followed in construing and sustaining State laws, those who desire to violate law would receive great encouragement. As a rule Courts have recog-

nized this fact and have sustained statutes which prevented these transactions, which are incidental to the unlawful acts. In doing this some innocent acts may be included, but this inconvenience cannot be used as a valid objection to a statute which was intended to promote the public good and to help in the enforcement of law for that end.

The Supreme Court of North Carolina in the recent case of Glenn vs. Southern Express Co., states this proposition as follows:

> "The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced to sell and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of evasion of the prohibition law that restrictions upon the arrival or delivery in the State are necessary to prevent illicit sales."

This is a concise statement of the facts which the officers of the law face in Prohibition territory. Wherever any means are provided for the introduction of liquor for purposes which result in little harm, this very means is used by the liquor interests to break down the main purpose of the law. Consequently, the States have been compelled to prohibit these acts which represent the lesser evil in order to prevent the greater. In practically every instance those who complain about these statutes are the ones who are responsible by their lawlessness for their enactment. If the liquor interests from outside the State of West Virginia had respected the sovereign will of the people of that State, many of these laws probably would never have been enacted. It became necessary in order to carry out the policy of the State and to secure a reasonable enforcement of the organic and statute law, to enact these provisions—making the place of delivery the place of sale, and prohibiting receipt and possession of liquor from common carriers.

LEGISLATIVE POLICY OF WEST VIRGINIA SUSTAINED BY ITS SUPREME COURT.

When this case was before this Court on the original hearing, it was claimed that the Supreme Court of West Virginia would not sustain the statutes in question. Since the former hearing the Supreme Court of West Virginia has modified, and virtually reversed the decision in the Gilman case, or at least the construction placed upon that decision by opposing counsel. This has been referred to in a former part of this brief.

In the two decisions recently handed down by the Supreme Court of West Virginia, the position of that Court is made clear. The first case was entitled State vs. Davis, No. 2864, which involved the law which prohibits soliciting or receiving orders for liquor, which is section 3 of the Yost law, and section 8, which makes it unlawful to advertise such liquors for sale. The Court, after citing the case of Delameter vs. South Dakota, 10 Am. & Eng. Anno. 733; Hooper vs. California, 155 U. S. 648; Williams vs. Fears, 179 U. S. 270; Rearick vs. Pennsylvania, 203 U. S. 507, said:

> "But in the face of these federal decisions how are these provisions of the statute to be applied to interstate business, or to transactions originating outside of the State? It is insisted, of course, that they fall at once under the protecting aegis of the Wilson Act, or if not so, that they come under the protection of the Webb-Kenyon law. The case of Delameter v. South Dakota, supra, is a direct decision that a local statute regulatory of the business of soliciting orders for liquor located in another State is valid when applied to one personally present in this State and engaged in the inhibited business. This upon the ground that **such transaction is accessory or incidental to the business of bringing liquors into the state and there selling or otherwise disposing of them in violation of the local statute**, and that any other construction of the Wilson Act would at least violate the spirit of that statute, and render the state

helpless in the enforcement of its local statutes intended to be protected by that act." * * *

"The Delameter case is not a direct decision on the specific point involved in this case. But anti-advertising liquor laws, like the one involved here, generally, have been held valid when applied to interstate transactions. State v. Delaye (Ala.), 68 So. 993. Defendant was not personally or by agent in the State doing the things inhibited by statute; he made use of the United States mails to accomplish his purposes, and to do what, if present personally or by agent, he could not lawfully have accomplished." * * In R. M. Rose Co. v. State, 133 Ga., 353 65, S. E. 770, 36 L. R. A. (N.S.), 443, reversing the judgment of the lower court, it was distinctly decided that an indictment charging defendant with use of the mails in soliciting orders by means of advertising literature substantially as shown in this case constituted no offense under the penal code of that State. But as suggested in the note to this case, as reported in the 36 L. R. A. supra, while the Delameter case may not be a direct decision on the powers of the State to regulate or prohibit the business of advertising or soliciting orders in the manner attempted in the Yost Law, that case nevertheless destroys any affirmative support against the existence of that power which might otherwise be derived from the earlier cases referred to.

"It must be conceded that soliciting orders by means of advertisements, if resulting in a sale of liquors located outside of the State, although incidental thereto, would constitute a part of such sale, and that if prior to the Wilson Act, such soliciting would have been protected as interstate commerce, for unless a part of such commerce, how could such personal solicitation and receipt of orders for liquors, prior to that act, have been brought under the protection of the Federal Constitution and protected thereby? Whether solicited by personal presence in the State, or by the use of the United States mails, the effect of the transaction with respect to the local statute would necessarily be the same.

"Did the use of the mails by defendant in the manner shown constitute an offense under our statute? Federal protection to the liquor traffic having

been withdrawn by the Wilson Act and the Webb-Kenyon Act, we think our statute covers the case presented by the pleadings and proof in this case. Use of the mails is not prohibited by the statute, but the business of soliciting orders by means of circulars, etc., is prohibited. It seems but a short step from the act of being personally present and soliciting orders or distributing advertisements to the doing of the same thing by the agency of the United States mails. We do not think a good ground of distinction can be suggested. Of course the object to be accomplished could not be attained except by delivery of the matter to prospective customers, but this end could as well be reached by the use of the mails as by the physical presence of the absent dealer in the State. * * *

"As interpreted in the Delameter case, the Wilson act removed all Federal restraint upon the States in regulating the soliciting of orders for liquor to be imported and delivered to the consignee in violation of local statutes. And as applied to actual shipments of liquor, the Supreme Court in Rhodes v. State of Iowa, 179 U. S. 412, and in Re Rahrer, 140 U. S. 545, decided that the word 'arrival,' employed in the Wilson Act, meant actual delivery of the liquor to the consignee, and that until then the State statute could not become operative upon an interstate shipment. Chief Justice Clark, in his concurring opinion in **State v. Cardwell (N. C.), 81 S. E.** 628, 630, referring to the cases just cited, says: 'In this latter case, however, Chief Justice Fuller, speaking for the Court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported

packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that sta ute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.'

"We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substantial foundation in the history of the Federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of the State statute. * * *

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the State by a common carrier would be in furtherance of the unlawful purposes of those violating the statute.

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the State, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

"So we conclude, in view of the interpretation of the Wilson Act, that this latest Federal statute supplementing that act has so far removed restrictions upon State action as to validate the provisions of the Yost Law in question, and that the defendant is guilty as charged."

The Supreme Court of West Virginia further expressed its views with reference to these statutes in the case of State vs. Sixo, No. 2895. This case involved a violation of Section 31 of the West Virginia statutes which provided, that:

"It shall be unlawful for any person to bring or carry into the State, or from one place to another within the State, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed, or written on the side or top of the suit case, trunk or other container in large, display letters in the English language, the contents of the container or containers and the quantity and kind of the liquors contained therein."

In sustaining the validity of this statute the Court said:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7, of the acts of the Legislature of 1915, is unconstitutional and void. Counsel argues at great length to prove that the Legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purposes. * * *

"The case of State v. Gilman, supra, is authority for the proposition that a statute prohibiting the keeping of liquors by one person for another, without a State license therefor, is unconstitutional and void, **under the Constitution then in force; but it does not follow that the Legislature in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be brought into the State or carried from one place to another within the State.**

"Since the case of State v. Gilman was decided, the Constitution of the State has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the Legislature to **'enact such laws with regulations, conditions, securities and as may be necessary to carry into effect the provisions of this section.'**

"This amendment became effective July 1, 1914.

"It is the duty of the Legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the State, or carried from one place to another within the State, in quantities of one-half gallon or

more, to be marked or labeled. Whether or not this is a wise policy is not for the Courts to determine. If the Legislature has not exceeded its powers, the Courts cannot interfere. The Courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the Courts."

"In a well considered case of Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, Mr. Justice Hughes wrote a very able opinion and said:

" 'It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, that it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

"We are clearly of the opinion that the portion of said section 31, now under consideration, is within the legislative power."

It is manifest from these decisions that the Supreme Court of West Virginia upholds the doctrine in construing their own constitution as set forth in the Purity Extract Co. vs. Lynch case. Under this far-reaching and wise decision, even innocent acts may be prohibited when they are used as aids to the violation of laws enacted under the police power. It is certainly manifest to any public officer, who has had any experience in enforcing laws against the liquor traffic, that the statutes in question are necessary in order to have a reasonable enforcement of the prohibition laws of West Virginia.

If a liquor dealer from Baltimore, Cincinnati or Louisville, Ky., can reach over into West Virginia and by an express company, or railroad, distribute liquors in this way, a great benefit to be attained by the prohibitory law will be destroyed. As has been repeatedly held by the many State

Supreme Courts, the purpose of all these laws is to discourage and prevent the use of liquor. If as much liquor is to be used in a State after prohibition as before, it will then be admitted that the purpose of the law is a failure. We do not believe that any such construction is made necessary by the provisions of either the State or Federal Constitution.

The Supreme Court of West Virginia also enunciates the doctrine that any transaction which is accessory, or incidental to the bringing of liquors into the State to be disposed of in violation of law, may be prohibited. This doctrine, also, is sufficient to sustain the laws in question. If liquor may be delivered into West Virginia and the State cannot prevent any person from having it or possessing it, the enforcement of the statute is made unreasonable and difficult and the law-breaking liquor interests would be encouraged to increase their efforts in breaking down the remaining statutes intended to curb this well-recognized evil. The receiving of the liquor and the possessing it and delivering it into the State are all incidents to the acts which the State has legally prohibited. As has been said repeatedly by the Courts of last resort in cases cited, it is not the sale of liquor that injures the purchaser; it is not the possession of it primarily that injures the purchaser, **but the use of the liquor,** and all of these acts, the sale, possession and receipt, are but a means of placing the liquor where it will do harm. Consequently, the same reasoning which sustains the law prohibiting the sale of liquor should sustain the law which prohibits the receipt, or possession of the liquor.

The length to which the State will go in prohibiting these means which encourage the use, is a matter for legislative discretion. In the evolution of the race and the development of a higher civilization, these steps will be taken in response to growing public sentiment upon this question.

To deny the State the right to enact such laws would thwart the fundamental purpose of our government to pro-

mote the general welfare and safeguard public morals and the public good. The Supreme Court of West Virginia has laid down the principles by which it will be guided in construing these laws and we do not believe that this Court can justly interfere with these decisions, so clearly intended to aid the enforcement of law and promote the public welfare.

Statutes, which help to make men sober and patriotic, which result in reducing crime and degeneracy and which make possible the enforcement of law, must be valid, if our form of government is to endure.

We respectfully submit that the decree of the lower Courts should be sustained.

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Of Counsel for the State of West Virginia.